Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

In the Matter of SHMUEL B. KLEIN,
an attorney and counselor-at-law

SHMUEL B. KLEIN,
Petitioner,
-against-

GRIEVANCE COMMITTEE FOR THE
NINTH JUDICIAL DISTRICT,
Respondent.

On Petition for Writ of Certiorari
to the Court of Appeals of the
State of New York

Petition for a Writ of Certiorari

Shmuel B. Klein, Petitioner, pro se
268 West Route 59
Spring Valley, NY 10977
914-425-2682

Counsel, pro se for Petitioner

58pp

Petition for a Writ of Certiorari

Questions Presented for Review

1. (a) The questions presented for review are as follows:

(i) Whether an attorney disciplinary charge may be based upon a court order found to violate due process?

(ii) Whether an attorney disciplinary charge may be based upon an order which violated the free exercise clause of the United States Constitution?

(iii) Whether a 5 year suspension from the practice of law is violative of equal protection?

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed is as follows:

For the Petitioner:

Shmuel B. Klein, Petitioner, pro se

268 West Route 59, Spring Valley, NY 10977

914-425-2682

For the Respondent:

Grievance Committee for the ninth judicial district of the State of New York, by Gloria A. Bunze,

399 Knollwood Road, Suite 200, White Plains, NY 10603

(c) See attached

(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies:

None as of this filing.

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(daily ed. Oct. 26,1993) 15
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(e) A concise statement of the basis for jurisdiction in this Court, is as follows:

(i) The date of the judgment or order sought to be reviewed is December 22, 1997.

The New York Court of Appeals which is the court of last resort in New York State decided important constitutional questions in a way that conflicts with the Due Process Clause, the First Amendment and Equal Protection Clause of the United States Constitution. The first decision deciding that there was no right to appeal was dated September 23, 1997. The decision denying a motion for reargument is dated December 22, 1997.

(iv) The statutory provision believed to confer on this Court jurisdiction to review on a writ of

certiorari the judgment or order in question is Rule 10 of this Court in that the New York Court of Appeals decided an important constitutional question in a way that conflicts with the Due Process Clause, First Amendment and Equal Protection Clause of the United States Constitution and so far departed from the acceptable and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers and that the state court of last resort decided an important federal question in a way that conflicts with relevant decisions of this Court.

(v) Notifications required by Rule 29.4(b) are not applicable as there is no statute in question.

f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case are as follows:

(i) First Amendment of the United States Constitution: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

(ii) Fifth and Fourteenth Amendments of the United States Constitution guaranteeing due process and Equal Protection;

(iii) The Fourteenth Amendment clause of the United States Constitution as it binds the States and has been held to contain implicitly not only the standards of fairness and justice found within the Fifth Amendment's clause but also to contain many guarantees that are expressly set out in the Bill of Rights. See also French v. Barber Asphalt Paving Co.,

181 U.S. 324, 328 (1901).

(g) A concise statement of the case setting out the facts material to consideration of the questions presented is as follows:

This Petition for a Writ of Certiorari seeks review of a state-court judgment which denied a right to appeal of the New York Court of Appeals, the court of last resort in New York, from the Appellate Division, Second Department, the Court of first impression, notwithstanding the fact that the order underlying the suspension was vacated by the United States Court of Appeals for the Second Circuit, as it was found to have been in violation of the Due Process clause. See page 13 of the appendix.

The stage in the proceedings, both in the court of first instance and in the appellate courts, is

completed as the motions were denied. See page 1 and 3 of the appendix.

Federal Constitutional questions sought to be reviewed were raised initially by motions to dismiss in the court of first impression (the New York Supreme Court Appellate Division) and then as a motion for Leave to Appeal in the Court of last resort in New York State, the New York Court of Appeals. Both motions were denied. See pages 1, 3 and 13 of the appendix.

(h) A direct and concise argument amplifying the reasons relied on for allowance of the writ is as follows:

No attorney disciplinary charge can be based upon orders that violate due process, or the First Amendment and Equal Protection.

Your petitioner was suspended from the

practice of law based upon an order found to violate due process. See page 13 of the appendix.

After the suspension order was entered, the United States Court of Appeals for the Second Circuit reversed an order upon which the suspension order was based, because that underlying order violated "due process". It is therefore urged that this Court grant this petition as no attorney suspension order can be based on any order actually found to violate due process.

"[T]he profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise". Ex Parte Burr, 22 U.S. (9 Wheat.) 529, 530, 6 L.Ed. 152 (1824).

Discipline or disbarment of an attorney presents a case or controversy within the meaning of

Article III of the Constitution, because it has concrete adverse effects on the attorney that can be rectified by further judicial action. This Court has adjudicated numerous attorney disciplinary matters. E.g., In re Snyder, 472 U.S. 634 (1985); Theard v. United States, 354 U.S. 278 (1957); Ex parte Garland, 71 U.S. 333, 378-79 (1866).

This Court explicitly has held that state court bar admissions and bar disciplinary decisions present "cases or controversies" under Article III. In In re Summers, 325 U.S. 561, 568, 65 S.Ct. 1307, 1312, 89 L.Ed. 1795 (1945), the Supreme Court held that it had jurisdiction to review a state supreme court's denial of admission to that state bar because that denial involved a case or controversy. The Court stated: "Where relief is thus sought in a state court against the action of a committee, appointed to advise the

court, and the court takes cognizance of the complaint without requiring the appearance of the committee or its members, we think the consideration of the petition by the Supreme Court, the body which has authority itself by its own act to give the relief sought, makes the proceeding adversary in the sense of a true case or controversy." Id. at 567-68, 65 S.Ct. at 1311-12. The Court emphasized that "[t]he form of the proceeding is not significant. It is the nature and effect which is controlling." Id. at 567, 65 S.Ct. at 1311.

Bar disciplinary actions, and disbarments are essentially judicial in nature and thus present a case or controversy under Article III. See Summers, 325 U.S. at 566-67, 65 S.Ct. at 1311 (1945) ("A case arises, within the meaning of the Constitution, when any question respecting the Constitution, treatise or laws of the United States has assumed "such a form that

the judicial power is capable of acting on it.'").

Although a State "is free to regulate procedure of its courts in accordance with it own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); West v. Louisiana, 194 U.S. 258, 263 (1904); Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897); Jordan v. Massachusetts, 225 U.S. 167, 176 (1912).

The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them and to deny access to its courts is also subject to restrictions imposed by the contract, full faith and credit, and privileges and immunities clauses of the Constitution.

Angel v. Bullington, 330 U.S. 183 (1947).

No agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." Ex parte Virginia, 100 U.S. 339, 346-47 (1880).

It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived

by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just." Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Justice Frankfurter dissenting). Due process is violated if a practice or rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

The suspension of my license to practice law, based upon an order found to have violated the "due process clause" should be reviewed by this Court.

Your petitioner was also suspended based upon an order which sanctioned him for insisting on his First Amendment Right to practice his religion by bringing

a motion to arbitrate before a Rabbinical Court.

In Sherbert v Verner (374 US 398, 403) this Court stated that an incidental burden on the right to free exercise of religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate' " (citing NAACP v Button, 371 US 415, 438). The compelling state interest is dispute resolution. Seeking arbitration before a Rabbinical Court cannot be a basis to suspend an attorney, especially when the matter was submitted to arbitration before the Rabbinical Court.

In Marsh v. Chambers, 463 US 783, 812 "even when the government is not compelled to do so, by the free exercise clause, it may to some extent, act to facilitate the opportunity of individuals to practice their religion." I should not be suspended for insisting

upon my First Amendment rights to arbitrate before a Rabbinical Court.

Religion is not only among fundamental rights, but is a "preferred" right of the "highest order." See 139 CONG. REC. 514350-01, 514364 (daily ed. Oct. 26,1993) (statement of Sen. Hatch) ("religious liberty ... is the most fundamental liberty any human being can claim . . . Even the most scorned in our society, prison inmates, have a legitimate interest in religious liberty.") ; S. REP. No. 111, 103rd Cong. , 1st Sess., at 9 & n.22 (1993), reprinted in 1993 U.S.C.C.A.N. 1892 (citing cases) see also Gilbert v. Minnesota, 254 U.S. 325, 343 (1920) (Brandeis, J., dissenting) (Fourteenth Amendment guarantees more than the liberty to acquire and enjoy property); Palko v. Connecticut, 302 U.S. 319, 325 (1937) (per Cardozo, J.) (Bill of Rights made applicable to the states to preserve principles of

justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental"); Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring) (fundamental liberties are those "of the individual which history has attested as indispensable conditions of an open as against a closed society') Abington School Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("The First Amendment's guarantees, as applied to the States through the Fourteenth Amendment are to be read together . . . to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.").

The most "exacting scrutiny" of government actions in four instances - when government regulation: (1) is not neutral, i.e., targets religious

conduct or believers either facially or as applied in particular instances, Hialeah, 508 U.S. at 533-34; Smith, 494 U.S. at 878-79; (2) is not generally applicable, i.e., selectively burdens religious exercise, Hialeah, 508 U.S. at 542; Smith, 494 U.S. at 879-81; (3) creates system of individualized government assessment of the reasons for the relevant conduct, following individualized exemptions from a general requirement, Hialeah, 508 U.S. 537; Smith, 494 U.S. at 884; or (4) burdens religious freedom in conjunction with other constitutional rights, i.e., a hybrid situation, Smith, 494 U.S. at 881-82.

In each of these four instances, the government action "is invalid unless it is justified by a compelling interest is narrowly tailored to advance that interest." Hialeah, 508 U.S. at 533 (citing Smith, 494 U.S. at 878-79).

Basing a suspension upon an order which violated your petitioner's First Amendment free exercise of his religion cannot be a basis to suspend his license to practice law.

Further, the degree of the suspension was a violation of the Equal Protection Clause of the Constitution and requires this Courts review.

The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). See also Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910). Use of the latter standard did in fact result in some invalidations. E.g., F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Stewart Dry

Goods Co. v. Lewis, 294 U.S. 550 (1935); Mayflower Farms v. Ten Eyck, 297 U.S. 266 (1936).

No suspension of the length imposed upon your petitioner can be found in any reporter for the conduct alleged. The arbitrary length of the suspension has no fair of substantial relation to the object of discipline so that all persons are treated alike.

CONCLUSION

WHEREFORE, it is respectfully submitted that the within Petition be in all respects granted.

Dated: March 17, 1998
Spring Valley, NY

Respectfully,

Shmuel Klein, pro se
268 Route 59 West
Spring Valley, NY 10950
(914) 425-2682

CERTIFICATE OF SERVICE

STATE OF NEW YORK)
COUNTY OF ROCKLAND)

I, Asmaa Suqi, affirms under the penalties of perjury pursuant that I am not a party to this action and that I am over the age of 18 years old. I have an office at 268 Route 59, Spring Valley, New York 10977, and I served the within Petition for Writ of Certiorari and Appendix on March 18, 1998, by depositing a three copies thereof in a post-paid wrapper, placing it in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, overnight mail, addressed to:

Gloria A. Bunze
399 Knollwood Road
Suite 200
White Plains, NY 10603

Asmaa Suqi

Affirmed and subscribed to before me 3/18/98

Notary

SHMUEL D. KLEIN
Notary Public, State of New York
No. 2KL4941210
Qualified in Rockland County
Commission Expires 7/25/1998

APPENDIX

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State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty second-second day of December 1997

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

----------X

In the Matter of Shmuel B. Klein, an attorney and counselor-at-law. Mo. No. 1395

Grievance Committee for the Ninth Judicial District,
Respondent,
Shmuel B. Klein,
Appellant.

----------X

A motion for renewal and/or reargument to the Court of Appeals in the above case having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Stuart M. Cohen
Clerk of the Court

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-third day of September 1997

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

----------X

2-25 Mo. No. 1395
In the Matter of Shmuel B. Klein,
an attorney and counselor-at-law.

Grievance Committee for the
Ninth Judicial District,
Respondent,

Shmuel B. Klein,
Appellant.

----------X

The appellant having filed notice of appeal and a motion for leave to appeal and for a stay to the Court of Appeals in the above cause, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed,

without costs, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

Stuart M. Cohen
Clerk of the Court

CORRECTED PER CURIAM OPINION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 269 August Term, 1997
(Argued: September 24, 1997) (Decided: , 1997)

Docket No. 96-5133

IN RE: MOSES STEIN,
Plaintiff,

SHMUEL KLEIN,
Plaintiff-Appellant,
v.

ULSTER SAVINGS BANK,
Defendant-Appellee.

BEFORE: ALTIMARI, PARKER AND KEITH,[*]
Circuit Judges

Appeal from a judgment entered in the United States District Court for the Southern District of New York (Charles L. Brieant, J.) on October 29, 1996, affirming sanctions imposed on appellant by the bankruptcy court (Stuart Bernstein, U.S. Bankruptcy Judge) on June 8, 1994. We hold that it was error for the bankruptcy court to impose sanction without providing appellant with notice or an opportunity to be heard.

Vacated and remanded.

Shmuel Klein, Spring Valley, NY,
for Plaintiff-Appellant.

(Anthony Carlini, Law Office of Howard C. St. John, Kingston, NY, of counsel), for Defendant-Appellee.

Per Curiam:

I. BACKGROUND

Schmuel (sic) Klein is an attorney who was representing debtor Moses Stein. On November 15, 1993, Klein filed a Chapter 13 bankruptcy petition on Stein's behalf to stop the imminent foreclosure sale of Stein's residence by Ulster Savings Bank ("Ulster"). The foreclosure was automatically stayed pursuant to 11 U.S.C. § 362.

On March 10, 1994, Ulster moved to have the automatic stay lifted on the grounds that Stein had not made any post-petition payments on his mortgage. In response to this motion, Klein produced copies of three uncancelled checks as proof that Stein had made the post-petition mortgage payments. Nonetheless, on March 15, 1994, Judge Bernstein lifted the stay, holding that the bank had made a prima facie demonstration that post-petition payments had not been made.

The district court found that on May 17, 1994, Stein and Klein failed to appear at a section 341 meeting with Bankruptcy Trustee Jeffrey Sapir and United

States Bankruptcy Judge Jeffrey Gallet.
Klein contends that they failed to appear because Stein was ill and that they informed Trustee Sapir that they would be unable to attend the meeting. Sapir moved to have Stein's Chapter 13 petition dismissed for failure to prosecute and for failure to deposit funds with the trustee.[1]

On March 31, 1994, Stein moved before Judge Bernstein to reargue the lifting of the automatic stay. Judge Bernstein granted this motion and heard reargument on April 6, 1994. At no time did Klein inform Judge Bernstein that a motion to dismiss the petition was pending before Judge Gallet.

At reargument, Klein again produced copies of three uncancelled checks as proof that the post-petition mortgage payments had been made. This time, Ulster conceded that it had received the checks, but contended that it was not aware of this fact when it made its original motion to lift the stay. Ulster explained that when it received the checks, they were contained in a sealed, self- addressed, stamped envelope that was mixed among a pile of other documents that Klein sent to Ulster. Judge Bernstein stated that he would reimpose the automatic stay if Stein paid Ulster all
post-petition payments due in full within one week. The court also sanctioned Klein in the amount of $500 to compensate Ulster for its costs and attorney's fees.

On April 7, 1996, Judge Gallet granted the motion to dismiss. Klein did not appear in response to this motion. He contends that his absence was due to

excessive traffic en route to the court.

On April 26, 1994, Klein filed a second Chapter 13 petition on behalf of Stein. This petition falsely represented that Stein had not filed a previous bankruptcy petition within six years.

Ulster moved for relief from the automatic stay or alternatively for dismissal of the petition. On June 8, 1994, Judge Bernstein heard argument on this motion and dismissed the second petition. Judge Bernstein found that the second petition--filed just eighteen days after the first petition was dismissed--violated 11 U.S.C. § 109(g). 11 U.S.C. § 109(g) provides:

Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if--(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case.

Judge Bernstein held that Stein's failure to appear at the section 341 meeting constituted a "failure to abide by an order of the Court." He further found that Klein filed the second petition with "personal knowledge that the debtor was ineligible to file under Section 109(g)(1) and that the new petition was interposed to delay the foreclosure." Judge Bernstein characterized Klein's behavior as

"[making] a mockery of the prior proceedings and orders which this court has issued." Judge Bernstein then charged Klein with various acts of dishonesty and malfeasance in connection with Stein's bankruptcy petitions, including: (1) placing the mortgage payments in a sealed, self-addressed, stamped envelope and burying the envelope within a pile of papers; (2) lying about whether the post-petition mortgage payments had been made; (3) failing to appear at the section 341 meeting; (4) failing to inform Judge Bernstein, prior to reargument of Ulster's motion to lift the automatic stay, that the trustee's motion to dismiss the petition was pending before Judge Gallet; (5) failing to appear in response to the trustee's motion to dismiss before Judge Gallet; and (5) filing a second petition in violation of § 109(g)(1). Based on this conduct, and acting pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure, Judge Bernstein sanctioned Klein $2,500 for abuse of process.[2]

Klein appealed the imposition of sanctions to the district court. The district court agreed with Judge Bernstein that Klein's filing of the second bankruptcy petition constituted an abuse of the bankruptcy process. The court further concluded that Judge Bernstein did not abuse his discretion in imposing sanctions. Finally, the court held that it was not error for the bankruptcy court to impose sanctions without a hearing. It explained that while Congress expressly amended Fed.R.Civ.P. 11 in 1993 to require notice and an opportunity to be heard before the imposition of sanctions, it did not amend Rule 9011 to include

such a requirement.

II. DISCUSSION

In Ames Dep't Stores, Inc. v. Sayre Cent. Corp, 76 F.3d 66 (2d Cir. 1996), we held that "due process requires that courts provide notice and opportunity to be heard before imposing any kind of sanctions." 76 F.3d at 70. In Ames Dep't Stores, Inc., the district court, sua sponte and without notice, decided that the law firm of Skadden, Arps, Slade, Meagher & Flom was not entitled to any attorney's fees for its services in connection with a bankruptcy appeal. We remanded the case for a recalculation of the sanctions because "[n]othing in the ... case even approached a notice and opportunity to be heard before the district court ordered a denial of Skadden's requested fee." Id.

Although the district court in Ames Dep't Stores, Inc. did not expressly state that it was sanctioning Skadden, Arps pursuant to Rule 9011,[3] we clearly stated in that opinion that notice and an opportunity to respond is necessary prior to the imposition of "any kind of sanctions." Id. (emphasis added); see Rounseville v. Zahl, 13 F.3d 625, 632 (2d Cir. 1994) (Rule 11); Schoenberg v. Shapolsky Publishers, Inc., 971 F.2d 926, 936 (2d Cir. 1992) (28 U.S.C. § 1927); see also Martin v. Brown, 63 F.3d 1252, 1262 (3d Cir. 1995) ("[T]he fundamental requirements of due process--notice and an opportunity to respond--must be afforded before any sanction is imposed.").

We now expressly extend this holding to cover sanctions imposed pursuant to Rule 9011. Therefore, because Klein had no notice or opportunity to be heard before the bankruptcy court imposed sanctions, we direct the district court to remand this matter to the bankruptcy court to give Klein an opportunity to respond to Judge Bernstein's charges. A full evidentiary hearing, however, is not required. See International Ore & Fertilizer Corp. v. SGS Control Servs., Inc., 38 F.3d 1279 (2d Cir. 1994) (finding no due process violation where attorney threatened with Rule 11 sanctions received no hearing but had notice and opportunity to respond); see also Big Rapids Mall Assocs. v. Mutual Trust Life Ins. Co., 98 F.3d 926, 929 (6th Cir. 1996) (upholding imposition of Rule 9011 sanctions where attorney had notice and an opportunity to respond by brief and oral argument); Childs v. State Farm Mut. Auto. Ins. Co., 29 F.3d 1018, 1027 (5th Cir. 1994) ("Simply giving the individual accused of a Rule 11 violation a chance to respond through the submission of a brief is usually all that due process requires."); cf. Jensen v. Federal Land Bank, 882 F.2d 340, 342 (8th Cir. 1989) (remanding case for a hearing where attorney was not given notice and an opportunity to respond before Rule 9011 sanctions were imposed).

Because we are vacating the sanctions order, we need not reach Klein's argument that the bankruptcy court's imposition of a $2,500 sanction constituted an abuse of discretion.

Vacated and remanded.

[*] The Honorable Damon J. Keith of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

[1] The portion of this finding regarding Bankruptcy Judge Gallet's presence at this section 341 meeting is probably erroneous, as bankruptcy judges are not permitted to attend such meetings. See 11 U.S.C. § 341(c). However, the presence or absence of Bankruptcy Judge Gallet at this section 341 meeting is of no significance to this Court's analysis of this appeal.

[2] Judge Bernstein also imposed other fines to cover Ulster's expenses in responding to the second bankruptcy petition. These fines are not at issue in this appeal.

[3] The case was remanded in part to allow the bankruptcy court to specify the source of its authority to impose sanctions. See Ames Dep't Stores, Inc., 76 F.3d at 70.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

8272Z
S/hu

____AD2d____
GUY JAMES MANGANO, P.J.
LAWRENCE J. BRACKEN
ALBERT M. ROSENBLATT
SONDRA MILLER
WILLIAM C. THOMPSON, JJ.

95-09901

In the Matter of Shmuel B. Klein,
an attorney and counselor-at-law,

Grievance Committee for the Ninth Judicial District, petitioner;
Shmuel B. Klein, respondent.

DISCIPLINARY proceeding instituted by the Grievance Committee for the Ninth Judicial District. The respondent was admitted to the practice of law by this court on June 29, 1988, under the name Shmuel Berel Klein. By order of this court dated January 3,

1996, the issues raised in the petition and in the answer were referred to the Honorable Lawrence Martin, as Special Referee, to hear and report.

Gary L. Casella, White Plains, N.Y. (Gloria A. Bunze of counsel), for petitioner.

Shmuel Klein, Spring Valley, N.Y., respondent pro se

PER CURIAM. The petition contains three charges of professional misconduct against the respondent. After a hearing, the Special Referee sustained all three charges. The Grievance Committee now moves to confirm, and the respondent cross moves to disaffirm, the report of the Special Referee.

Charge One alleged that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of Code of Professional Responsibility DR 1-102(A)(4) (22

NYCRR 1200.3[a][4]), conduct that adversely reflects on his fitness to practice law, in violation of Code of Professional Responsibility DR 1-102(A)(8) (22 NYCRR 1200.3[a][8]), and conduct that is prejudicial to the administration of justice, in violation of Code of Professional Responsibility DR 1-102(A)(8) (22 NYCRR 1200.3[a][8]), in connection with his handling of a bankruptcy matter in the United States Bankruptcy Court entitled In Re Moses Stein, Debtor. The facts underlying Charge One are as follows:

1. In an "Extract of Bench Ruling Dismissing Chapter 13 Case and Imposing Sanctions on the Debtor's Attorney" (hereinafter bench ruling) dated June 9, 1994, the Honorable Stuart M. Bernstein, United States Bankruptcy Judge, found that the respondent, the debtor's attorney, engaged in

improper conduct.

2. In the bench ruling, the court found that the respondent attempted to present an ex parte order to show cause to the court on or about March 28, 1994, which the court declined to entertain. The object of the order to show cause was to reimpose an automatic stay on the foreclosure sale of the debtor's home.

3. The court further found that, when the respondent again presented the order to show cause in the presence of the bank's attorney on or about March 30, 1994, he initially contended that a foreclosure sale of the debtor's home was imminent, which was not the case since no sale had been scheduled.

4. The respondent then represented that the debtor's confirmation hearing was

scheduled for April 7, 1994, and that it was necessary to resolve the stay issue before then. Based on the respondent's representations, the court scheduled the hearing on the debtor's motion for April 6, 1994.

5. The court found that the respondent gave false testimony at the hearing on April 6, 1994, and that the respondent lied to cover his office's mistake in sending three checks for past due mortgage payments to the bank's attorneys rather than to the bank.

6. At the hearing on April 6, 1994, the court sanctioned the respondent for the aforementioned conduct, ordering him to pay $500 to the bank. When the bench ruling was reduced to writing, some nine weeks later, the

respondent still had not paid the sanction.

7. The court further found that, throughout the many proceedings in the Stein bankruptcy matter, the respondent failed to disclose that the Chapter 13 trustee had moved before another United States Bankruptcy Court Judge, Judge Jeffrey Gallet, to dismiss or convert the matter pursuant to 11 USC §1307(c)(1), (e)(4) due the debtor's failure to appear at a "section 341" hearing and to deposit necessary funds with the trustee.

8. In the bench ruling the court noted that the trustee's motion was returnable on April 7, 1994, the date the respondent represented to the court as the date of debtor's confirmation hearing. On that date, however, neither the debtor nor the respondent appeared in

response to the trustee's motion or at the confirmation hearing. By an order dated April 7, 1994, Judge Gallet granted the trustee's motion and dismissed the case.

9. The court also noted that the foreclosure sale was rescheduled for the end of April 1994. On April 26, 1994, on the heels of the previous dismissal and on the eve of the sale, the respondent, on behalf of the debtor, filed a second bankruptcy petition.

10. The court found that the second bankruptcy petition constituted an "abusive" Chapter 13 filing that was not done in good faith, but to frustrate the legitimate rights of the bank. The court further found that the second petition flouted a prior order of the court granting conditional relief from the stay,

caused the bank unnecessary expenses, and abused the bankruptcy process.

11. The court also found the respondent falsely certified, in response to a question on the second bankruptcy petition, that the debtor had not filed a bankruptcy petition during the previous six years. The court found that the respondent knew, based on his personal knowledge, that the debtor was ineligible to file the second bankruptcy petition since he had filed a petition on the debtor's behalf in November 1993, which was dismissed on April 7, 1994. Thus, the court found that the second petition was interposed to delay the foreclosure.

12. Based on the aforementioned violations, the court directed the respondent to pay, within 30 days, sanctions in the sum of $3,500; $2,500

to the Clerk of the United States Bankruptcy Court and $1,000 to the bank as compensation for its expenses, including attorney's fees.

Charge Two alleged that the respondent engaged in conduct that adversely reflects on his fitness to practice law, in violation of Code of Professional Responsibility DR 1-102(A)(8) (22 NYCRR 1200.3[a][8]), and conduct that is prejudicial to the administration of justice, in violation of Code of Professional Responsibility DR 1-102(A)(5) (22 NYCRR 1200.3[a][5]), in connection with his handling of a legal malpractice case entitled *Eliezer Goldstock and American Jewish Society for Distinguished Children, Inc. v. Shmuel B. Klein.* The facts underlying Charge Two are as follows:

1. In a decision and order of the Supreme Court, Rockland County, dated October 6,

1994, the Honorable Anthony A. Scarpino, Jr., *inter alia*, dismissed 10 of the respondent's affirmative defenses in the above-entitled action, finding that either they were not defenses to the alleged claim or they were wholly without merit. The court noted that, despite the plaintiff's challenge, the respondent failed to making any showing of merit to the dismissed defenses.

2. In the aforementioned decision and order, the court warned the respondent and opposing counsel "that the abusive nature of the pleadings, correspondence, and conduct in this action must stop here. The hyperbole, harassment, and histrionics will no longer be tolerated. Failure to heed this warning will result in sanctions and referral by the Court to

the Grievance Committee." The court also stated that no further motions could be made without prior court approval.

3. Upon information and belief, Justice Scarpino was reassigned on or about January 1, 1995, and the matter was transferred to the Honorable Kenneth W. Rudolph.

4. On or about March 16, 1995, Justice Rudolph sent the respondent and opposing counsel a letter in which he stated that the "stern warning" issued by Justice Scarpino, Jr., in his decision and order dated October 6, 1994, had "been ignored and had gone unheeded".

5. Justice Rudolph's letter also stated that, despite Justice Scarpino's order that no further motions be made without prior court approval,

counsel continued the behavior described by Justice Scarpino as if the prior order never existed.

6. Justice Rudolph's letter advised counsel that a hearing would be held on March 21, 1995 to determine whether sanctions would be imposed against them for dilatory and oppressive conduct in violation of the prior orders of the court.

7. In a decision and order dated March 29, 1995, Justice Rudolph, *inter alia*, found that, "[i]n complete contravention of the prior order of this Court and in violation of the preliminary conference order to serve his answer to the amended complaint the [respondent] has made an Omnibus Motion to compel arbitration, to renew previous motions to strike, to dismiss

plaintiffs' complaint to the dismiss the action as to the individual plaintiff, Eliezer M. Goldstock".

8. In the March 29, 1995, order the court also found that the omnibus motion included the respondent's third motion to compel arbitration, the two prior applications having been denied by the same court. Morevover, the respondent admitted to the court that he had no legal basis for making such application and that his request for arbitration was based on religious laws.

9. The court further found that, when opposing counsel agreed to a discontinuance of the action of behalf of the individual plaintiff pursuant to the respondent's motion (see subparagraph 7 above), the respondent said, "I

changed my mind, I want him in the action," and the respondent did not want that portion of the relief requested. The court stated, "[T]his contemptuous response clearly demonstrates [the respondent's] intent to harass his adversary and grind this litigation to a halt in a sea of frivolous motions."

10. The court further stated that the respondent's attempt to revisit the previous decisions of the court was equally egregious. Despite the court's admonitions, the respondent displayed what appeared to be a complete lack of understanding of the serious nature of the proceedings by submitting a further affirmation in support of his omnibus motion on March 24, 1995, three days after a hearing on sanctions was completed by the court.

11. Based on the aforesaid conduct, the court imposed sanctions of $1,000 against the respondent, ordering him to pay that sum to the Lawyers' Fund of Client Protection of the State of New York within 20 days and to file proof of payment with the Clerk of the Supreme Court, Rockland County, within 10 days thereafter.

12. On or about May 4, 1995, Justice Rudolph sent the respondent a letter in which he stated that opposing counsel had been given permission to file a motion for summary judgment in response to which the respondent interposed affirmative defenses previously dismissed by a prior order of the court. The letter further stated that the respondent's correspondence indicated the respondent's

awareness that he was not to revisit the previously dismissed defenses.

Charge Three alleged that respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of Code of Professional Responsibility DR 1-102(A)(4) (22 NYCRR 1200.3[a][4]), and/or conduct that adversely reflects on his fitness to practice law, in violation of Code of Professional Responsibility DR 1-102(A)(8) (22 NYCRR 1200.3[a][8], by making a false and/or misleading statement in his answer to a complaint of professional misconduct. The facts underlying Charge Three are as follows:

1. On or about March 14, 1995, the Grievance Committee received a complaint of professional misconduct against the respondent alleging that he lied and/or made

misrepresentations regarding his malpractice insurance or in the course of defending the aforementioned legal malpractice.

2. In his written answer to the complaint, dated March 21, 1995, the respondent stated, "I have never had a malpractice claim and try very hard not [sic] to avoid them."

3. The respondent, in fact, has had at lease one additional malpractice claim filed against him as a third-party defendant in an action entitled *Thanlenberg v. Rosenfeld and Charles/Charles v. Klein*. The third-part summons and verified complaint were refiled on or about April 27, 1994, in the Supreme Court, Rockland County.

At the rehearing conference the respondent made the following admissions: With regard to

Charge One, the respondent admitted that, by an order dated April 7, 1994, Judge Gallet granted the trustee's motion and dismissed the Stein bankruptcy petition. The respondent also admitted that, in his written answer to a complaint of professional misconduct, he stated, "I have never had a malpractice claim and try very hard not [sic] to avoid them."

In view of the documentary evidence submitted by the Grievance Committee, the respondent's admissions, and the testimony adduced at the hearing, the Special Referee properly sustained all three charges against the respondent. Thus, the petitioner's motion to confirm the Special Referee's report in granted, and the respondent's cross motion to disaffirm the Special Referee's report is denied.

In determining the appropriate measure of discipline to impose, we have considered the

mitigating factors proffered by the respondent with regard to Charge Two, including the nature of the relationship between him and Mr. Goldstock and the fact the underlying actions was ultimately discontinued with prejudice.

Under the totality of the circumstances, the respondent is suspended from the practice of law for a period of five years.

MANGANO, P.J., BRACKEN, RONSENBLATT, MILLER and THOMPSON, JJ., concur.

ORDERED that the petitioner's motion to confirm the report of the Special Referee is granted; and it is further,

ORDERED that the respondent's cross motion to disaffirm the report of the Special Referee is denied; and it is further,

ORDERED that the respondent, Shmuel B.

Klein, is suspended form the practice of law for a period of five years, commencing July 30, 1997, and continuing until the further order of the court, with leave to the respondent to apply for reinstatement no sooner than six months prior to the expiration of the said period of five years upon furnishing satisfactory proof (a) that during the said period he refrained from practicing or attempting to practice law, (b) that he had fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended, and resigned attorneys (22 NYCRR 691.10), and (c) that he had otherwise properly conducted himself; and it is further,

ORDERED that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this court, the respondent, Shmuel B. Klein, shall desist and refrain from (1) practicing law

in any form, either as principal or agent, clerk or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law.

ENTER

Martin H. Brownstein

Clerk

Supreme Court, U.S.
FILED
MAY 28 1998
OFFICE OF THE CLERK

No. 97-1785

In The

Supreme Court of the United States

October Term, 1997

SHMUEL KLEIN,

Petitioner,

vs.

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a state attorney disciplinary charge may be based upon a bench ruling of the Federal Bankruptcy Court imposing sanctions on the attorney without a prior hearing when, on remand from the United States District Court of Appeals for the Second Circuit, the Bankruptcy Court reimposed the sanctions after a hearing, and when the attorney, in the interim, did not exhaust his procedural remedies in the state courts?

2. Whether an attorney disciplinary charge may be based upon a court order which, after a hearing, imposed sanctions based upon its findings that the attorney repeatedly failed to heed the court's warnings to cease his abusive conduct, and repeatedly ignored the court's order that no further motions be made without prior court approval?

3. Whether the Appellate Division of the Supreme Court of the State of New York, which is empowered to oversee the practice of law in the state, after a full and fair hearing at which the attorney was represented by counsel, may suspend an attorney for a five-year period based upon the unique set of facts and circumstances in the case?

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APPENDIX

Appendix A — Memorandum Decision And Order Imposing Sanctions Against Shmuel Klein Of The United States Bankruptcy Court Of The Southern District Of New York Dated May 11, 1998 ..... 1a

PRELIMINARY STATEMENT

This brief is submitted in opposition to Petitioner's application for a writ of certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, dated June 30, 1997, which suspended him from the practice of law for five years effective July 30, 1997. Petitioner's motion for reargument of the court's June 30, 1997 decision or, in the alternative, for leave to appeal to the State of New York Court of Appeals, was denied by decision and order of the Appellate Division dated July 30, 1997. On its own motion, however, the Appellate Division adjourned the effective date of the suspension to August 13, 1997. Petitioner's motion for leave to appeal to the State of New York Court of Appeals was denied by said court, by order dated September 23, 1997, on the ground that no substantial constitutional question was directly involved. Petitioner's motion for renewal and/or reargument of the September 23, 1997 State of New York Court of Appeals' order was denied by order dated December 22, 1997.

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under this Court's Rule 10. The statutory provision is Title 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

By order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, dated and entered January 3, 1996, Respondent herein was authorized to institute and prosecute a disciplinary proceeding against Petitioner herein. The issues raised by the disciplinary petition and any answer thereto were referred to the Special Referee, the

Honorable Lawrence Martin, a former justice of the Supreme Court of the State of New York, Westchester County, to hear and report.

A petition containing three charges of professional misconduct, dated March 18, 1996, was served upon Petitioner, alleging that he had been guilty of conduct involving dishonesty, fraud, deceit or misrepresentation; conduct adversely reflecting on his fitness to practice law; and conduct prejudicial to the administration of justice.

Petitioner filed a motion to dismiss, dated March 29, 1996, which was denied by order of the Appellate Division, dated June 6, 1996.

A pretrial conference was held on July 30, 1996, and a disciplinary hearing was held on August 26, 1996, at which Petitioner was represented by counsel and had a full and fair opportunity to be heard. Petitioner and Respondent each submitted both post-trial and reply briefs, after which Justice Martin issued a Report of Referee, dated January 14, 1997, wherein he found that each of the three charges against Petitioner had been sustained.

In sustaining Charge One of the disciplinary petition, the Special Referee found that the United States Bankruptcy Court for the Southern District of New York, Westchester Division, justifiably sanctioned Petitioner for (1) acting in an over zealous manner and in contravention of Bankruptcy Court rules and procedures; (2) making misrepresentations to the Bankruptcy Court about the imminence of a foreclosure sale; (3) lying at a Bankruptcy Court hearing; and, when the bankruptcy proceeding was dismissed because of his failure to appear; (4) bringing on another bankruptcy proceeding falsely alleging that

there were no other bankruptcy filings in the prior six years. Petitioner claimed that the false representation regarding a prior bankruptcy filing was a mistake, but the Special Referee did not find Petitioner's claim to be any more credible than did the bankruptcy judge.

In sustaining Charge Two of the disciplinary petition, the Special Referee found that the Supreme Court of the State of New York, Rockland County, justifiably sanctioned Petitioner for raising ten affirmative defenses in a legal malpractice action that had been filed against him, which defenses were dismissed by the court as either not constituting a defense to the claim alleged, or were wholly without merit. Petitioner failed to make any showing of merit to the defenses on the motion to dismiss, and the court warned Petitioner to stop the harassment and histrionics.

A different judge took over the malpractice action, and also warned Petitioner about his continuing conduct, then set the matter down for a hearing on sanctions. After the hearing, the judge found that, although the plaintiff had not agreed to have the malpractice action arbitrated by a religious court, Petitioner made three motions for arbitration. He admittedly had no legal basis for doing so. Then, when the plaintiff later agreed to religious arbitration, Petitioner contemptuously told the court he no longer wanted the arbitration, stating that he wanted the plaintiff to remain in the court action. After the hearing on sanctions, Petitioner submitted a further affirmation in support of his omnibus motion, which asserted the arbitration demand yet another time. Based on Petitioner's admissions at the disciplinary hearing, the Special Referee found that Petitioner still did not seem to appreciate the impropriety of his actions.

In sustaining Charge Three of the disciplinary petition, the Special Referee found that Petitioner made a false statement to

Respondent in an answer to a complaint of professional misconduct. Although Petitioner gave extensive testimony at the disciplinary hearing in an attempt to imbue the statement at issue with a meaning other than the obvious one, the Special Referee found Petitioner's testimony to be unworthy of belief.

By order dated June 30, 1997, the Supreme Court of the State of New York, Appellate Division, Second Department, granted Respondent's motion to confirm in full the report of the Special Referee, and suspended Petitioner from the practice of law in the State of New York for a period of five years, and until further order of the court. Petitioner's motion for reargument of the court's June 30, 1997 decision or, in the alternative, for leave to appeal to the State of New York Court of Appeals, was denied by decision and order of the Appellate Division dated July 30, 1997. On its own motion, however, the Appellate Division adjourned the effective date of the suspension to August 13, 1997. Petitioner's motion for leave to appeal to the State of New York Court of Appeals was denied by said court, by order dated September 23, 1997, on the ground that no substantial constitutional question was directly involved. Petitioner's motion for renewal and/or reargument of the September 23, 1997 State of New York Court of Appeals' order was denied by order dated December 22, 1997.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS NO STANDING WITH RESPECT TO THE FIRST OF HIS "QUESTIONS PRESENTED FOR REVIEW" AND DID NOT EXHAUST HIS PROCEDURAL REMEDIES IN THE COURTS BELOW.

Subsequent to the State of New York Court of Appeals' denial of Petitioner's motion for leave to appeal, the United States Court of Appeals for the Second Circuit, by decision entered October 20, 1997, found that Petitioner was constitutionally entitled to a hearing before sanctions were imposed against him by the Bankruptcy Court. Said decision vacated the Bankruptcy Court's June 9, 1994 bench ruling, on which Charge One of the disciplinary petition was based, and remanded it to the Bankruptcy Court for a hearing on the issue of sanctions.

By memorandum decision dated May 11, 1998 the Bankruptcy Court, after giving Petitioner an opportunity to be heard, reaffirmed the findings set forth in its June 9, 1994 bench ruling, and reimposed sanctions against him. (App. A, pp. 1a-24a). The May 11, 1998 decision moots Petitioner's argument that he was suspended from the practice of law partially based upon a disciplinary charge which itself was based upon a court order violative of due process.

It is respectfully submitted that Petitioner had a full and fair opportunity to be heard on whether the Bankruptcy Court's sanctions were rightfully imposed, putting to rest any question of whether a state disciplinary charge may be based on an order found to violate due process. Therefore, the first question presented by Petitioner is moot.

The mootness of the question notwithstanding, Petitioner did not exhaust his procedural remedies before petitioning this Court for a writ of certiorari: He failed to seek relief from the Supreme Court of the State of New York, Appellate Division, Second Department, when the United States District Court of Appeals for the Second Circuit vacated and remanded the ruling upon which Charge One of the disciplinary petition is based. The issue is procedural, not constitutional.

Furthermore, Petitioner's suspension from the practice of law is only partially based on the sanctions imposed by the Bankruptcy Court, which served as the basis for Charge One of the disciplinary petition. The suspension is also based on the Appellate Division's findings that Petitioner engaged in the egregious misconduct alleged in Charges Two and Three of the disciplinary petition, which, even without the misconduct alleged in Charge One, support a suspension from the practice of law.

II.

THE COURT ORDER UPON WHICH CHARGE TWO OF THE DISCIPLINARY PETITION IS BASED DID NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE UNITED STATES CONSTITUTION.

Petitioner claims that the court order upon which Charge Two of the disciplinary petition is based violated the free exercise clause of the United States Constitution. He has repeatedly raised the same argument in the proceedings below, and it has repeatedly been found to be without merit. In fact, Petitioner attempted throughout the course of the disciplinary proceeding to manufacture constitutional questions where none exists. Merely cloaking a question in the mantle of constitutional language, however, does not elevate it to a legitimate

constitutional question meriting review by this Court. In actuality, Petitioner simply disagrees with the factual findings and legal determinations of the State of New York Supreme Court, Appellate Division, Second Department, which suspended him from the practice of law; the State of New York Court of Appeals, which reviewed the suspension decision; and the two separate courts in the matters underlying Charges One and Two of the disciplinary petition.

Petitioner's statement at page thirteen of his petition for writ of certiorari (referring to the legal malpractice action underlying Charge Two of the disciplinary petition) that he "was also suspended based upon an order which sanctioned him for insisting on his First Amendment Right to practice his religion by bringing a motion to arbitrate before a Rabbinical Court" is a distortion and misrepresentation of the facts. As Justice Rudolph's decision, dated March 29, 1995, sets forth in detail Petitioner's repeated attempts to have the malpractice action removed to a Rabbinical Court, despite the plaintiff's refusal to agree and the court's dismissal of prior applications, are only a portion of the extensive misconduct for which he was sanctioned.

Upon information and belief, the malpractice action was filed against Petitioner in the State of New York Supreme Court, Rockland County, in July 1993. Justice Rudolph's March 1995 decision reflects that during the interim period Petitioner repeatedly was warned of the court's extreme displeasure with his various misconduct, and advised of the consequences if he continued to conduct himself in an improper manner and ignore the court's directives.

In an attempt to justify his repeated motions to have the malpractice matter referred to the Rabbinical Court for arbitration, in spite of the court's prior dismissals of same,

Petitioner testified at the disciplinary hearing that he was motivated by good intentions: He wanted the matter referred to the Rabbinical Court so that the plaintiff, Dr. Goldstock, would be in compliance with Jewish law and would not be ostracized by the Orthodox Jewish community. Even assuming *arguendo* that Petitioner was motivated by an altruistic impulse to "save" the man who was suing him for malpractice, that does not excuse his conduct. Surely it should have been left to Dr. Goldstock to decide whether he wanted to litigate in the civil or the Rabbinical Court. Dr. Goldstock should not have been subjected to Petitioner's oppressive litigation tactics, even assuming they were misguided attempts to coerce Dr. Goldstock into complying with a religious law that Petitioner had arrogantly decided was good for him.

Furthermore, the record of the disciplinary proceeding reflects that Petitioner did not request that his rabbi send a summons to Dr. Goldstock until December 1994. If Petitioner was motivated by a concern that Dr. Goldstock would be ostracized by the religious community if he did not agree to have the matter heard by a Rabbinical Court, why did Petitioner wait a year-and-a-half to manifest his concern by seeking the rabbi's intervention? Similarly, if Petitioner was motived by concern for his own standing in the religious community, why did he wait such a length of time after the malpractice action was filed before seeking the rabbi's intervention?

In any event, the speciousness of Petitioner's argument that his suspension was partially based upon an order sanctioning him for insisting on his First Amendment right to practice his religion by bringing a motion to arbitrate before a Rabbinical Court is illustrated by the fact that when Dr. Goldstock finally succumbed to Petitioner's pressure and agreed, in or about May 1995, to have the matter removed to a Rabbinical Court, Petitioner told Justice Rudolph "in a

contemptuous manner such as to offend the Court," that he had changed his mind and wanted Dr. Goldstock to remain a party in the pending malpractice action.

III.

PETITIONER'S FIVE-YEAR SUSPENSION FROM THE PRACTICE OF LAW DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The five-year suspension imposed upon Petitioner by the State of New York Supreme Court, Appellate Division, Second Department, is not excessive or a violation of equal protection, as Petitioner claims. It is solely within the discretion of the Appellate Divisions of the New York State courts to determine appropriate sanctions after reviewing each disciplinary matter individually and carefully weighing each unique set of facts and circumstances, being mindful that one of the clear purposes of such disciplinary sanctions is to preserve public confidence in the legal profession. *See Matter of Nulle*, 97 A.D.2d 657.

In the proceedings below, Petitioner argued that the New York courts had been inconsistent in imposing disciplinary sanctions in cases of similar misconduct. In support of his argument, Petitioner cited two cases wherein the court censured attorneys (*In re Higgins*, 105 A.D.2d 462; *Matter of Werlin*, 170 A.D.2d 77), one case wherein the court imposed a three-month sanction (*Matter of Brenner*, 191 A.D.2d 800) and one case wherein it imposed a one-year sanction (*Matter of Sanchirico* (209 A.D.2d 341) for misconduct that Petitioner apparently views as analogous in severity to his own. All the cases have widely varying fact patterns, both from each other and from the facts at issue in Petitioner's disciplinary proceeding. Rather than having the intended effect of

demonstrating the unfairness of Petitioner's five-year suspension, a reading of the cited cases clearly demonstrates that the Appellate Divisions, in the interests of fairness and justice, review each matter individually and carefully weigh each unique set of facts and circumstances before reaching a conclusion as to an appropriate sanction.

In any event, Petitioner's argument conveniently ignores the plethora of cases in which the Appellate Divisions imposed sanctions of equal severity for misconduct similar to Petitioner's (*see, e.g., Matter of Gabel*, 201 A.D.2d 3, wherein the court suspended Mr. Gabel for five years for making a misstatement to the State of New York Supreme Court and a false statement to the Grievance Committee in his answer to a complaint of professional misconduct).

It is respectfully submitted that the Appellate Division appropriately exercised its discretion in imposing a five-year suspension in Petitioner's case, based upon the facts and circumstances of the case, and that Petitioner has failed to present any equal protection issues that warrant review by this Court.

IV.

JURISDICTION ON WRIT OF CERTIORARI IS NOT WARRANTED IN THIS MATTER.

Rule 10 of the United States Supreme Court Rules is entitled "Considerations Governing Review on Certiorari." It states:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling

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nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Although Rule 10 is not exhaustive, the facts of the instant matter do not relate to the "character of the reasons" that this Court will consider for a petition for a writ of certiorari. The issues involved in this case do not reach the constitutional dimensions worthy of address by the Supreme Court of the

United States. Petitioner couched his arguments in constitutional due process, free exercise, and equal protection language, but, in fact, he simply disputes the factual findings and legal determinations made by the courts below. Because none of the arguments advanced by Petitioner involves an important question of federal law that has not been, but should be, addressed by this Court, its further consideration of Petitioner's claims is not warranted.

CONCLUSION

Petitioner has presented no constitutional issue or important federal question that warrants review by this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM DECISION AND ORDER IMPOSING SANCTIONS AGAINST SHMUEL KLEIN OF THE UNITED STATES BANKRUPTCY COURT OF THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 11, 1998

UNITED STATES BANKRUPTCY COURT OF THE SOUTHERN DISTRICT OF NEW YORK

In re

Moses Stein

Debtor.

Chapter 13
Case No. 94 B 20708 (SMB)

MEMORANDUM DECISION AND ORDER IMPOSING SANCTIONS AGAINST SHMUEL KLEIN

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Appendix A

STUART M. BERNSTEIN
United States Bankruptcy Judge

By Order dated June 9, 1994, I dismissed this chapter 13 case with prejudice, and *sua sponte* imposed monetary sanctions on the debtor's attorney, Shmuel Klein ("Klein"), without prior notice. Klein appealed the award of sanctions to the United States District Court which affirmed. Thereafter, Klein appealed to the United States Court of Appeals for the Second Circuit. In *In re Moses Stein*, 127 F.3d 292 (2d Cir. 1997), the Court concluded that Klein was entitled to prior notice of the sanctions motion, and vacated and remanded the matter so that he could present a response. The Second Circuit noted, however, that a full evidentiary hearing was not required. *Id.* at 295.

Following the remand, I issued an order to show cause directing the parties to appear for the purpose of scheduling further proceedings. I conducted a conference on December 15, 1997, which Klein and counsel for Ulster Savings Bank ("USB"), the debtor's mortgagee, attended.[1] I afforded Klein sixty days to submit a response to the sanctions motion. Klein thereafter submitted his own affirmation, those of two former employees, and that of Joseph J. Haspel, Esq., his counsel in disciplinary proceedings pending in the state courts, in opposition to the imposition of sanctions.

For the reasons that follow, I conclude that Klein signed the chapter 13 petition in this case in violation of Federal Bankruptcy Rule 9011. As a result, I sanction him in the sum of $500.00.

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1. USB's counsel attended the conference in response to the order to show cause, but has not submitted papers in connection with the pending matter. Counsel explained that Klein paid the $1,000.00 in sanctions that I had ordered him to pay to USB, and that USB did not wish to spend further time or money participating in the matter.

Appendix A

BACKGROUND

This background discussion is based upon the record of the prior proceedings in this case,[2] Klein's submissions in the matter *sub judice*, and Bankruptcy Judge Adlai S. Hardin, Jr.'s opinion in *Ulster Savings Bank v. Kizelnik (In re Kizelnik)*, 190 B.R. 171 (Bankr. S.D.N.Y. 1995), a subsequent chapter 13 case filed by Klein, on behalf of the debtor's granddaughter, following the dismissal of this case.

A. Events Leading Up to the Order Imposing Sanctions

On December 22, 1987, the debtor, Moses Stein, and his nondebtor spouse, Rivka Stein, executed a note and mortgage in favor of USB on their home located at 28 Dorsett Road, Spring Valley, New York. *In re Kizelnik*, 190 B.R. at 173. They defaulted in May 1992, and USB obtained a judgment of foreclosure in April 1993. *Id.* USB scheduled the first foreclosure sale for May 1993, but the Steins, represented by Klein, obtained a stay of the sale from the state court pending a traverse hearing on September 13, 1993. *Id.* The Steins failed to appear at the traverse hearing, the court lifted the stay, and USB scheduled a second foreclosure sale for November 15, 1993. *Id.* Moses Stein, again represented by Klein, filed a chapter 13 petition in this Court one day before the foreclosure sale. This prevented the foreclosure from going forward because the filing of the petition triggered the automatic stay. *Id.*

On March 10, 1994, USB presented its motion to lift the automatic stay. Opposing the motion, Klein represented both orally and in writing that the debtor had made postpetition

2. Annexed as an appendix is the *Extract of Bench Ruling Dismissing Chapter 13 Case and Imposing Sanctions on the Debtor's Attorney*, filed June 14, 1994 ("Extract").

mortgage payments. He offered as evidence three *uncancelled* third party checks, dated December 1, 1993, January 1, 1994 and February 1, 1994, but separated by only seven check numbers. I signed an order the same day granting USB relief from the stay, and USB scheduled a third foreclosure sale.

On or about March 28, 1994, Klein presented an *ex parte* order to show cause, requesting that I schedule a hearing on the debtor's motion to vacate the March 10 order. The order to show cause contained a decretal paragraph that immediately reimposed the stay pending the hearing. Klein did not tell USB's attorney that he was seeking the equivalent of a temporary restraining order, did not explain why he had not, and his papers did not set forth the nature of the emergency that required immediate, *ex parte* relief. *See* Fed. R. Civ. P. 65(b). Accordingly, I declined to sign the proposed order to show cause.

On or about March 30, 1994, Klein presented a second order to show cause, this time on notice to and in the presence of USB's attorney. Klein's papers again failed to set forth any emergency, but he represented at the chambers conference that the foreclosure sale was imminent. USB's attorney — who had travelled from Kingston, New York to Bowling Green to attend the conference — responded that no sale was imminent (it was scheduled for April 28, 1994, four weeks hence). He observed that Klein could have learned this with a telephone call. In response, Klein blamed USB's counsel for not calling him to advise him that no foreclosure sale was imminent.

At the chambers conference, Klein also stated that it was necessary to resolve the stay issue prior to the confirmation

hearing scheduled for April 7, 1994, before Judge Gallet.[3] Accordingly, I scheduled the vacatur motion for April 6, 1994. I did not grant an immediate stay because no sale was imminent.

The proof at the April 6 hearing showed that Klein had sent three checks to USB's attorney mixed in with a pile of other documents and sealed in an envelope *self-addressed to Klein*. USB's attorney did not open the sealed envelope. Instead, he held the envelope up to the light, determined that it contained checks, and mailed them back to Klein. Klein again blamed USB and/or its attorney. He stated that the envelope was not sealed, and was included to facilitate the return of a receipt. Upon questioning from the bench, however, Klein conceded that he lacked any personal knowledge about the transmission of the checks and admitted that he did not ask either USB or its lawyer to return a receipt. I concluded that Klein had lied to cover his office's mistake in sending the checks to USB's attorneys with the opposition papers rather than to USB as the debtor was required to do.

Nevertheless, it appeared that the debtor sincerely wanted to pay the mortgage, save the home from foreclosure, and presumably, pay the two years of arrears under the chapter 13 plan. Accordingly, at the conclusion of the hearing, I vacated the March 10 Order, and issued an Order reimposing the automatic stay, on condition that the debtor pay the five outstanding postpetition mortgage payments by April 14. I also imposed a $500.00 sanction on Klein.

Having fought so hard to reimpose the stay and make the payments, the debtor should have been eager to comply. Instead,

3. Following Judge Schwartzberg's death, Judge Gallet and I sat in White Plains one day each week. This lasted for approximately four months from February through June, 1994.

he again defaulted. Further, unbeknownst to me — Klein had never mentioned it — the chapter 13 trustee had moved to dismiss his case because the debtor failed to attend the meeting of creditors required by 11 U.S.C. § 341(a),[4] or to make the plan payments, pending confirmation, as required by 11 U.S.C. § 1326.[5] The trustee's motion was also returnable on April 7, 1994, the same day as the confirmation hearing and only one day after the vacatur hearing that Klein insisted had to go forward. Neither the debtor nor his counsel appeared on April 7, and Judge Gallet dismissed the case.

On April 26, 1994, only two days before the third scheduled foreclosure sale, the debtor commenced this chapter 13 case, again represented by Klein.[6] The petition that Klein signed

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4. Section 341(a) states:

> Within a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors.

5. Section 1326(a)(1) states:

> Unless the court orders otherwise, the debtor shall commence making the payments proposed by a plan within 30 days after the plan is filed.

The debtor must file his chapter 13 plan within 15 days of the petition date. Fed. R. Bankr. P. 3015(b). It appears that Stein filed his plan with his petition.

6. One may legitimately ask why he did not make the mortgage payments and reimpose the automatic stay under the April 6 order. He had fought hard for the right to make the payments. In addition, the automatic

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certified that the debtor was eligible to file a second petition.[7] USE moved to lift the stay or to dismiss this second case. On June 9, 1994, I concluded that the case was not filed in good faith, and dismissed the second case with prejudice pursuant to 11 U.S.C. 109(g)(1). I stated at the time:

> [T]he petition was not filed in good faith, but instead was filed to frustrate the legitimate rights of Ulster which the Court had granted under the conditional order. The Debtor has managed to occupy his residence for an extended period without paying his mortgage. His response to the initial foreclosure sale was to file a Chapter 13 petition as the hammer was about to fall. The Debtor never appeared at the Section 341 meeting, or made the payments required by 11 U.S.C. §1326 (a)(1). After the Court granted a conditional order for relief from the stay, requiring the Debtor to make the post-petition payments, the Debtor failed to satisfy the conditions. In addition, the Debtor failed to appear at the confirmation hearing, failed to oppose the motion to dismiss, permitted the prior case to be dismissed, and then filed a new case, again on the eve of

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stay would have been reinstated, preventing a foreclosure by USB. The answer presumably lies in the relative economics of chapter 13. Here, the automatic stay was purchased more cheaply by filing a new petition rather than by paying the mortgage arrears.

7. Klein also falsely certified that Stein had not filed a bankruptcy in the previous six years. He now attributes this to an oversight by his clerical staff. In their haste to put together the second petition, they inadvertently used the same page from the first bankruptcy petition. (*See Affirmation of Andrea Klein*, dated Feb. 10, 1998.) Even if I credit this explanation, it does not affect the outcome.

> foreclosure, reimposing the automatic stay without the necessity of making the payments required under the conditional order.

(*Extract* at 7.) In addition to dismissing the case, I directed Klein to pay sanctions in the sum of $1,000.00 to USB and $2,500.00 to the bankruptcy clerk. He paid the former but not the latter.

B. Subsequent Filings

Following the dismissal with prejudice of the debtor's second case, USB rescheduled the foreclosure sale, for the fourth time, for July 19, 1994. *In re Kizelnik*, 190 B.R. at 173. Klein moved by order to show cause to stay the sale, citing his intention to file an appeal from this Court's order dismissing the second petition. Bankruptcy Judge Connelly denied that motion for failure to timely file a notice of appeal. *Id.*

The debtor faced a quandary. He could not stay the sale because he could not file another case until 180 days had lapsed following Judge Gallet's dismissal. *See* 11 U.S.C. § 109(g)(1). On July 18, 1994, however, one day before the foreclosure sale, Klein filed a chapter 13 petition on behalf of Bracha Kizelnik, Stein's granddaughter. *In re Kizeluik,* 190 B.R. at 174. Kizelnik contended that she was a tenant in her grandparents' house and held an option to purchase it. When it became apparent that Kizelnik had no interest in the property or personal liability to USB, the bank commenced an adversary proceeding seeking a declaratory judgment or relief from the stay. *Id.* Judge Hardin concluded that Kizelnik had no right to de-accelerate the mortgage and cure the Steins' mortgage defaults in her own chapter 13 plan. Finding that the sole reason for

Kizeluik's filing was to block the foreclosure sale of the Steins' property, Judge Hardin dismissed Kizelnik's case, and provided that any future filings by any person claiming an interest in the Steins' property would not operate as a stay on USB's right to foreclose absent a further order of the Court. *Id.* at 184. Judge Hardin concluded:

> The controversy between USB and the Steins and their granddaughter Kizelnik has been the subject of numerous proceedings in the state courts, three separate bankruptcy cases in this Court and innumerable decisions and orders in all of the courts affirming and reaffirming USB's right to proceed with and consummate its foreclosure on its collateral.
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> . . . The time has come to bring this interminable skein of litigation to an end.

Id.

DISCUSSION

As a threshold matter, Klein argues that another judge should decide the sanctions motion. First, Klein contends that following remand, the case should have been reassigned to Judge Hardin who sits in White Plains Bankruptcy Court. Second, he states that I am personally biased against him. Neither point requires my removal from the case.

A. Improper Assignment

Initially, the propriety of the assignment to me following remand is also presently on appeal to the District Court. Klein

filed a notice of appeal from the order to show cause that I issued scheduling the conference that eventually took place on December 15, 1997. His *Designation of Record and Statement of Issues Pursuant to Bankruptcy Rule 8006*, dated Nov. 25, 1997, states that under the local rules of this court, the remanded case should have been referred to the bankruptcy judge sitting in Westchester.

It is not my intention to intrude on the District Court's jurisdiction. Nevertheless, Klein has raised the same issue before me, and has never sought a stay pending appeal. In any event, the issue is a frivolous one, and should not delay the fulfillment of the Second Circuit's mandate. Rule 8016-1 of the local bankruptcy rules governs assignment upon remand. It states in pertinent part:

> If the order or judgment of the appellate court remands for further proceedings, a motion for such further proceedings shall be referred to the Judge who heard the proceeding below unless the appellate court orders otherwise.

Accordingly, to the extent that the issue is properly before me, I conclude that the assignment is proper.

B. Disqualification for Bias

Klein also argues that I should recuse myself because I am biased against him. (*See Affirmation of Shmuel Klein in Support of Motion to Disqualify and for Prover Assignment*, dated Nov. 25, 1997.) Disqualification for bias is governed by 28 U.S.C. § 455 which is made applicable by Fed. R. Bankr. P. 5004(a). Section 455 states, in pertinent part:

Appendix A

> (a) Any justice, judge, or magistrate [judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
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> (b) He shall also disqualify himself in the following circumstances:
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> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

The type of personal bias that supports a recusal motion ordinarily must be based on extrajudicial conduct, *Lewis v. Tuscan Dairy Farms, Inc.*, 25 F.3d 1138, 1141 (2d Cir. 1994), and "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *See United States v. Colon*, 961 F.2d 41, 44 (2d Cir. 1992); *Schiff v. United States*, 919 F.2d 830, 834 (2d Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991). Moreover, the opinions that a judge forms in the course of the proceedings do not constitute the basis for a bias or partiality motion unless they display a deep-seated antagonism that makes fair judgment impossible. *Liteky v. United States*, 510 U.S. at 555; *United States v. Conte*, 99 F.3d 60, 65 (2d Cir. 1996).

Klein has not pointed to any extrajudicial evidence of bias.[8] Moreover, he overlooks that his conduct in the debtor's bankruptcy

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8. Klein seems to argue that I should recuse myself because I recused myself in a later matter also involving him, *In re Albert Aflalo*, Case No. 94 B 45050. There, Klein represented a chapter 13 debtor and signed and filed numerous proofs of claim on behalf of certain creditors, each in the sum of

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cases may not have left the best impression. Klein lied to cover his office's failure in sending the mortgage payment checks to USB's attorney in a self-addressed and sealed envelope rather than directly to USB. He tried to obtain an *ex parte* temporary restraining order, and then dragged USB's counsel down from Kingston, New York, to oppose his request for an immediate injunction which was unnecessary. He did not tell me that his client had failed to attend the section 341 meeting or make the deposits required of all chapter 13 debtors, and that as a result, the chapter 13 trustee was asking Judge Gallet to dismiss the case on April 7, 1994. Instead, he urged me to schedule the vacatur hearing for April 6, telling me only that the confirmation hearing was scheduled for the next day. Further, when he ultimately prevailed at the April 6 hearing and obtained a conditional order, he failed to appear the next day before Judge Gallet who dismissed the debtor's case, and instead of making the past due mortgage payments, filed yet another case on the eve of foreclosure to stay the sale.

Here, Klein has sought to recuse me to avoid defending the sanctions motion. As discussed below, he barely contests

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$1.00 (in one case, $10.00). These "claims" deviated substantially from the information in the debtor's schedules which Klein had presumably prepared and submitted on that debtor's behalf. The chapter 13 trustee expressed bewilderment and concern, and Klein's associate, who attended the May 25, 1995 hearing, could not explain why Klein had signed and filed patently false claims.

The filing of these claims was deeply troubling, and Klein withdrew them that same day by letter to the trustee, dated May 25, 1995 At the hearing, I questioned Klein's good faith and directed the chapter 13 trustee to make an appropriate motion. I subsequently recused myself from deciding the trustee's sanctions motion that I had invited. Although it was beyond cavil that the Klein claims lacked any factual basis and delayed the confirmation process, it may have *appeared* that I had prejudged the matter.

his objective bad faith in this case, or the mandatory sanction that flows from Federal Bankruptcy Rule 9011. Instead, he blames the sanction on me, and insists that I step aside because I have criticized his actions in this case. If my imposition of sanctions under these circumstances required recusal, any judge who held a party or lawyer in contempt or imposed sanctions would have to recuse himself or herself in all subsequent proceedings. Accordingly, the recusal motion is denied.

B. The Motion for Sanctions

1. Bankruptcy Rule 9011

Fed. R. Bankr. P. 9011[9] requires a court to sanction an attorney or party who signs a pleading or other submission that

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9. The version of Federal Bankruptcy Rule 9011 that was in effect at the time in question stated in pertinent part:

> Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. . . . The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorneys or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. . . . If a document is signed in violation of this rule, the court on motion or on its

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he knows, or should know after reasonable inquiry, contains misstatements. It is similar to the pre-1993 version of Fed. R. Civ. P. 11, and a court may look to the developed case law under the former Rule 11 in interpreting Bankruptcy Rule 9011. *See In re Coones Ranch, Inc.*, 7 F.3d 740, 742 n.4 (8th Cir. 1993); *In re Cohoes Indus. Terminal, Inc.*, 931 F.2d 222, 227 (2d Cir. 1991); *In re 72nd Street Realty Assocs.*, 185 B.R. 460, 470 (Bankr. S.D.N.Y. 1995). In *Cohoes,* the Second Circuit Court of Appeals established the criteria for applying Bankruptcy Rule 9011:

> A petition for Chapter 11 bankruptcy may be deemed frivolous if it is clear that on the filing date there was no reasonable likelihood that the debtor intended to reorganize and no reasonable probability that it would eventually emerge from bankruptcy proceedings. [Citations omitted]. Generally, courts should conclude that a debtor has no demonstrable intent to reorganize only if, upon considering the totality of the circumstances, there is substantial evidence to indicate that the debtor made a bad faith filing. [Citations omitted].

Id. at 227.

The test for bad faith under Rule 11 — and hence, Bankruptcy Rule 9011 — is an objective one. *Sussman v. Bank*

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> own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

of Israel, 56 F.3d 450, 456-57 (2d Cir.), *cert. denied*, 516 U.S. 916 (1995); *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985). An attorney cannot escape sanctions by demonstrating his subjective good faith. *Sussman v. Bank of Israel*, 56 F.3d at 456; *Oliveri v. Thompson*, 803 F.2d at 1275; *Eastway Construction Corp. v. City of New York*, 762 F.2d at 253. To support sanctions under Rule 11, it must be "patently clear that a claim has absolutely no chance of success." *Eastway Construction Corp. v. City of New York*, 762 F.2d at 254.

Before filing a petition, an attorney must investigate whether his client is eligible to be a debtor and whether the filing is in good faith and not abusive. *In re Bono*, 70 B.R. 339, 344-45 (Bankr. E.D.N.Y. 1987). The attorney's signature on the petition constitutes a certification, under Bankruptcy Rule 9011, that the client is eligible to file and entitled to the benefits of Title 11, and that the client's purpose in filing is not simply delay. *Id.* at 344.

As discussed below, Klein violated Rule 9011 by signing the April 26, 1994 chapter 13 petition on his client's behalf. Klein's certification that his client was eligible to be a chapter 13 debtor was improper in light of the bar on refiling imposed under 11 U.S.C. § 109(g)(1). Rather, it was designed to frustrate USB in exercising its legitimate right to foreclose a mortgage that had not been paid in two years.

2. Section 109(g)

Section 109(g) of the Bankruptcy Code is designed to prevent abusive serial filings. *In re Rosenthal*, 117 B.R. 710,

711 (Bankr. M.D. Fla. 1990); *In re Ellis*, 48 B.R. 178, 179 (Bankr. E.D.N.Y. 1985) (former § 109(f)); *see Generally* 2 Lawrence P. King, *et al.*, *Collier on Bankruptcy* ¶ 109.08, at 109-45 (rev. 15th ed. 1998). It provides that

> Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if —
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> (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
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> (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

11 U.S.C. § 109(g).

Subdivision (1) is disjunctive; it applies if the court dismisses the earlier bankruptcy for either of the enumerated willful failures. *See, e.g., In re Arena*, 81 B.R. 851, 855 (Bankr. E.D. Pa. 1988)("willful" modifies both prongs of section 109(g)(1)). In determining the individual's eligibility in the subsequent case, the court must consider the totality of the circumstances surrounding the prior dismissal. *See In re Miller*, 143 B.R. 815, 819 (Bankr. W.D. Pa. 1992); *In re Fulton*, 52 B.R. 627, 634 (Bankr. D. Utah 1985); *In re Patel*, 48 B.R. 418, 419 (Bankr. M.D. Ala. 1985).

Appendix A

Judge Gallet dismissed Stein's first case, on the motion of the chapter 13 trustee, for (1) failure to attend a section 341 meeting and (2) failure to make payments to creditors as required by 11 U.S.C. § 1326(a). Both are "failure[s] of the debtor to abide by orders of the court." *See. e.g.,* In re Montgomery, 37 F.3d 413, 414 (8th Cir. 1994) (section 341 meeting); *In re Nix*, 217 B.R. 237, 238 (Bankr. W.D. Tenn. 1998)(section 1326(a) payments); *In re Pappalardo*, 109 B.R. 622, 625 (Bankr. S.D.N.Y. 1990) (section 341 meeting); *In re Dodge*, 86 B.R. 535, 537 (Bankr. S.D. Ohio 1988) (both); *cf. In re King*, 126 B.R. 777, 781 (Bankr. N.D. Ill. 1991) (chapter 13 debtor's failure to make payments is a failure to appear before the court in proper prosecution of the case). Moreover, Stein "fail[ed] to appear before the court in proper prosecution of his case" when he failed to appear at the hearing on the motion to dismiss. *See In re Arena*, 81 B.R. at 855. Accordingly, if one or more of these failures was willful, section 109(g)(1) barred Stein's subsequent filing within the statutory period.

A failure is "willful" if it is intentional, deliberate, or knowing and voluntary, and not conduct which is accidental or beyond the person's control. *See, e.g., In re Bradley,* 152 B.R. 74, 76 (E.D. La. 1993); *In re McIver*, 78 B.R. 439, 441 (D.S.C. 1987); *In re Miller*, 143 B.R. at 818-19; *In re Pappalardo*, 109 B.R. at 625; *In re Ellis*, 48 B.R. at 179. In addition to deliberate or intentional conduct, the term also encompasses plain indifference to a known responsibility. *See, e.g., In re Nix*, 217 B.R. at 23839; *In re Miller*, 143 B.R. at 819; *In re Howard*, 134 B.R. 225, 226 (Bankr. E.D. Ky. 1991); *In re Ellis*, 48 B.R. at 179. While the mere failure to appear at one meeting or court hearing, or to make a payment under the proposed chapter 13 plan, is not by itself willful *e.g., In re Dodge,* 86 B.R. at 537, repeated instances of such conduct support the inference

that the failures were willful. *See. e.g., In re Nix*, 217 B.R. at 239; *In re Herrera,* 194 B.R. 178, 189 (Bankr. N.D. Ill. 1996); *In re Pappalardo*, 109 B.R. at 626; *In re King,* 126 B.R. at 780; *In re Fulton*, 52 B.R. at 634; *In re Nelkovski*, 46 B.R. 542, 544 (Bankr. N.D. Ill. 1985). The Court is obliged to weigh the debtor's explanations against the totality of the circumstances, including repeated failures, in determining whether the conduct was willful. *In re Fulton*, 52 B.R. at 634.

The totality of these circumstances signals but one conclusion to the objective inquirer: the dismissal in the first case was based on willful failures. Klein filed Stein's first case in November 1993 to stay USB's foreclosure sale. Thereafter, Stein failed to do anything required of a chapter 13 debtor. He did not attend the section 341 meeting, he did not make the required plan payments,[10] he did not make his postpetition mortgage payments and he did not appear at the confirmation hearing or oppose the dismissal motion on April 7. In short, he did what was necessary to stay the foreclosure but took no further steps to perform his duties as a debtor or to pay his obligations. When I directed him to pay USB as the price for reinstating the automatic stay, he simply permitted the case to be dismissed, filed a new case, and obtained a new stay.

Klein's conduct subsequent to the dismissal sheds additional light on the willfulness of the first dismissal and the bad faith

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10. Stein missed up to four plan payments. He had to make his first plan payment within thirty days after he filed his plan, *see* 11 U.S.C. § 1326(a), and it appears that he filed his plan with his petition on November 15, 1993. Stein's plan is not in evidence but chapter 13 plans generally call for monthly payments. Assuming he followed the general practice, and prior to the April 7, 1994 dismissal, he would have had to make plan payments on or about December 15, 1993, January 15, 1994, February 15, 1994 and March 15, 1994.

in filing the second case. In this regard, a court may consider subsequent conduct in passing on the issue of bad faith under Fed. R. Civ. P. 11, and hence, Bankruptcy Rule 9011. *See Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1471-72 (2d Cir. 1988) (subsequent conduct evidence of indifference to truth of prior pleading signed by attorney), *rev'd in part on other grounds, Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989); Ouadrozzi v. City of New York, 127 F.R.D. 63, 80 n. 30 (S.D.N.Y. 1989) (subsequent conduct may support an inference that an earlier signing was done in bad faith); *cf. In re National Student Marketing Litig.*, 78 F.R.D. 726, 729 n. 5 (D.D.C. 1978) (subsequent conduct sheds light on improper motive in filing counterclaim), *aff'd*, 663 F.2d 178 (D.C. Cir. 1980); *Grand Traverse Dev. Co. Ltd. Partnership v. Board of Trustees of the Gen. Retirement Svs. (In re Grand Traverse Dev. Co. Ltd. Partnership)*, 150 B.R. 176, 192 (Bankr. W.D. Mich. 1993)("additional facts or subsequent conduct may shed new light on the debtor's good faith in pursuing bankruptcy"). When Stein could no longer seek bankruptcy to delay the foreclosure, Klein filed a contrived case for Stein's granddaughter, *In re Kizelnik*, 190 B.R. 171, which Bankruptcy Judge Hardin concluded lacked merit and dismissed with prejudice.

Even without these subsequent facts before him, District Judge Brieant found the second filing objectively unreasonable. In affirming the first award of sanctions, District Judge Brieant put the point succinctly:

> The record is clear that the appellant filed the second bankruptcy petition with the knowledge that such a petition violated Title 11, Section 109(g)(1), and he endorsed the filing of the pleading falsely stating that the debtor Stein had not filed a prior

> petition in the previous six years. So there is no rule of law that warrants the filing of a petition.
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> There is no good faith argument as to why the statute should be changed or why it should not apply to the debtor's second filing. . . .[T]he Court does believe that there was no objective good faith basis for filing the second petition in the way that it was done and with the content that it contained, and the Court finds that the Bankruptcy Judge did not exceed his authority or abuse his discretion in imposing the sanctions. . . .

(*Affirmation of Shmuel Klein*, dated Feb. 13, 1998, Ex. "B" (*Affidavit of Joseph J. Haspel, Esq.*, at ¶ 18).)

Even at this late date, Klein has still not said why he thought Stein could file another case only three weeks after Judge Gallet dismissed the prior case. Moreover, he has failed to provide any evidence to contradict the application of section 109(g)(1), or the conclusion that he signed the second petition in bad faith.[11] All that he offers in his defense is an oblique reference to the state of the law in the affidavit of Joseph Haspel, Esq.[12], which

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11. He apparently argued to the Second Circuit that Stein failed to attend the section 341 meeting because Stein was ill, and that he (Klein) missed the dismissal hearing before Judge Gallet because he was caught in traffic. *In re Stein*, 127 F.3d at 293. Klein has not repeated either excuse in opposition to the present motion. In any event, neither excuse is credible. The docket sheet in the first Stein bankruptcy (case no. 93 B 22242) indicates that Klein never filed any opposition to the motion to dismiss. This implies that he did not intend to oppose it.

12. Klein characterizes Mr. Haspel as "an expert in the field of Bankruptcy." (*Affirmation of Shmuel Klein*, dated Feb. 13, 1998, at ¶ 3.) Suffice it to say that we are equally adept at interpreting the bankruptcy law.

Klein submitted to the New York Court of Appeals in connection with his suspension from practice.[13] (*Affirmation of Shmuel Klein*, dated Feb. 13, 1998, Ex. "B".) Mr. Haspel based his analysis on the mistaken premise that Judge Gallet dismissed the first Stein case solely because Stein missed a section 341 meeting. (*Id.* at ¶ 23.) Mr. Haspel evidently did not know that Stein also failed to make any plan payments, and that he failed to oppose the motion to dismiss or appear in court on April 7.

In any event, the three cases that Mr. Haspel cites do not support his proposition that reasonable minds would question the willfulness of the prior dismissal. (*See id.*, Ex "B." ¶ 22.) *In re Wamsganz*, 54 B.R. 759 (Bankr. E.D. Mo. 1985), *aff'd*, 804 F.2d 503 (8th Cir. 1986), does not even discuss the issue. *In re Arena*, 81 B.R. 851 (Bankr. E.D. Pa. 1988) refused to find willfulness where the debtor failed to appear at the section 341 meeting because he forgot about it and failed to appear at the hearing on the motion to dismiss because his wife misdirected the notice. Finally, *In re Dodge*, 86 B.R. 535 (Bankr. S.D. Ohio 1988) concluded that the failure to attend the section 341 meeting and make the deposits — both present here — constituted a failure to abide by an order of the court under section 109(g)(1), *id.* at 537, but the court refused to infer the requisite willfulness based upon the facts of that case. *Id.*

As noted, the evidence of willfulness is far more compelling in this case. More important, Klein does not argue that he researched this issue, and believed that Stein could file a new case on the heels of the prior dismissal. In fact, Klein has never

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13. The Appellate Division, Second Department suspended Klein from practice for five years, effective July 30, 1997, based in part on what transpired in this bankruptcy case. *See Matter of Klein*, 660 N.Y.S.2d 136 (N.Y. App. Div. 2d Dep't), *appeal dismissed & lv. to appeal denied*, 686 N.E.2d 1357 (N.Y. 1997).

contested Judge Brieant's conclusion that he lacked the objective basis to believe he had any right to file the second case. Klein knew or should have known — had he investigated the matter during the three week interval separating the first dismissal from the second filing — that section 109(g)(1) prevented the second petition.

3. The Amount of the Sanction

In light of the conclusion that the Klein violated Rule 9011, sanctions are mandated. When this case was first before me, I directed Klein to pay $1,000.00 to USB and $2,500.00 to the bankruptcy clerk. (*Extract* at 9-10.) Klein paid the bank but challenged the larger award. The Second Circuit did not reach that aspect of his appeal. *In re Stein*, 127 F.3d at 295.

I now conclude that the award should be reduced to $500.00. First, his conduct in this case has contributed to his suspension from practice, although I note that this has not stopped him from continuing to practice law in New York.[14]

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14. Klein's suspension took effect on or about August 1, 1997. Since then, he has filed the following twenty-nine bankruptcy cases in the Southern District of New York: *In re Pedro*, Case No. 97 B 22081 (filed 8/8/97); *In re Morton*, Case No. 97 B 22085 (filed 8/11/97) *In re Houston*, Case No. 97 B 23151 (filed 12/9/97); *In re Cintron*, Case No. 97 B 23186 (filed 12/15/97); *In re Weinstein*, Case No. 97 B 23197 (filed 12/16/97); *In re Benjaminson*, Case No. 97 B 23245 (filed 12/19/97); *In re Tzavis*, Case No. 97 B 23244 (filed 12/19/97); *In re Weissmandl*, Case No. 97 B 23243 (filed 12/19/97); *In re Glatzer*, Case No. 98 B 20068 (filed 1/13/98); *In re Solis*, Case No. 98 B 20069 (filed 1/13/98); *In re Yee*, Case No. 98 B 40215 (filed 1/13/98); *In re Lella*, Case No. 98 B 20109 (filed 1/14/98); *In re Menard*, Case No. 98 B 20110 (filed 1/14/98); *In re Fernandez*, Case No. 98 B 20111 (filed 1/14/98); *In re Nixon*, Case No. 98 B 20112 (filed 1/16/98); *In re Ottley*, Case (Cont'd)

Nevertheless, Klein supports a family, including eight children, and a large monetary sanction will exacerbate whatever hardship the suspension may impose on his family. Second, the amount is consistent with the sanctions imposed by other courts against Klein for similar conduct. *See, e.g., Michelson v. Chicago Bd. of Trade*, No. 83 Civ. 8898 (MEL), 1990 WL 74865, at *1 (S.D.N.Y. May 30, 1990)($500.00 sanction based on "meaningless opposition" to summary judgment motion); *Michelson v. Merrill Lynch Pierce Penner & Smith Inc.*, No. 83 Civ. 8898 (MEL), 1989 WL 31514, at *6-7 (S.D.N.Y. Mar. 28, 1989)(imposing two $500.00 fines based upon a groundless claim of witness tampering); *cf. First Nationwide Bank Inc. v. Felberman*, 657 N.Y.S.2d 431, 432 (N.Y. App. Div. 2d Dep't 1997) (directing Klein to pay $2,500.00 to the Lawyer's Fund for Client Protection of the State of New York for prosecuting a frivolous appeal).

(Cont'd)

No. 98 B 20305 (filed 2/5/98); *In re Hirsch*, Case No. 98 B 20440 (filed 2/20/98); *In re Elkoby*, Case No. 98 B 20479 (filed 2/25/98); *In re Licerio*, Case No. 98 B 20556 (filed 3/4/98); *In re Kapsack*, Case No. 98 B 20557 (filed 3/4/98); *In re Turco*, Case No. 98 B 20671 (filed 3/13/98); *In re Bernardo*, Case No. 98 B 21079 (filed 4/21/98); *In re Kahan*, Case No. 98 B 21080 (filed 4/21/98); *In re Ohle*, Case No. 98 B 21081 (filed 4/21/98); *In re Smith*, Case No. 98 B 21145 (filed 4/29/98); *In re Dikitnan*, Case No. 98 B 21146 (filed 4/29/98); *In re Pomeroy*, Case No. 98 B 21147 (filed 4/29/98); *In re Ismail*, Case No. 98 B 21148 (filed 4/29/98); and *In re Kiss*, Case No. 98 B 21228 (filed 5/6/98).

Appendix A

SO ORDERED.

Dated: New York, New York

May 11, 1998

s/ Stuart M. Bernstein
STUART M. BERNSTEIN
United States Bankruptcy Judge

Supreme Court, U.S.
FILED
JUN 11 1998
CLERK

(3)

No. 97-1785

In The
Supreme Court of the United States

October Term 1997

In the Matter of SHMUEL B. KLEIN,
an attorney and counselor-at-law

SHMUEL B. KLEIN,
Petitioner,
-against-

GRIEVANCE COMMITTEE FOR THE
NINTH JUDICIAL DISTRICT,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

Petitioner's Reply to Brief in Opposition for a Writ of Certiorari

Shmuel B. Klein, Petitioner, pro se
268 West Route 59
Spring Valley, NY 10977
914-425-2682

Counsel, pro se for Petitioner

30 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

(1) Whether an attorney disciplinary charge may be based upon a court order found to violate due process?

(2) Whether an attorney disciplinary charge may be based upon an order which violated the free exercise clause of the United States Constitution?

(3) Whether a 5 year suspension from the practice of law is violative of equal protection?

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PRELIMINARY STATEMENT

This Reply Brief is submitted to reply to those new issues alleged in the opposition to my petition for writ of certiorari to an order of the Court of Appeals of the State of New York, dated December 22, 1997.

REASONS TO GRANT THE WRIT

No attorney disciplinary charge can be based upon orders that violate due process, the First Amendment and Equal Protection.

The Respondent has included an order which was not the basis of my suspension from the practice of law for five years, written almost a year after the suspension. It was never part of the original record. Petitioner objects to the new order being included as part of the appendix.

Notwithstanding the objection, the new order (Bernstein #2) underscores the necessity of granting this petition for Writ of Certiorari. The new order reduced the amount of the sanction to five hundred dollars ($500.00). The new order back-handedly notes that I continue to practice in Bankruptcy Court and Federal Court, as allowed by the Rules of the Southern District of New York, Rule 2, without any sanctions. The new order has been appealed and, as was the fact in Bernstein Order #1, Bernstein #2 will likely be reversed and vacated. See Appendix, page 9.

The new order graphically illustrates the bias of this individual judge searching thousands cases I have filed for various entities, (it took him five months to

search my record and write the new order) desperately trying to find another bankruptcy sanction, which he could not find, and ultimately finding two other cases in which I was sanctioned (one ten years ago), neither of which resulted in the severe act of suspension.

The fact remains, and the respondent admits, my suspension from the practice of law is based on an order found to have violated due process.

No attorney disciplinary charge can be based upon orders that violate due process, or the First Amendment and Equal Protection.

Bernstein #2 selectively quotes the Hon. Charles Brieant, United States District Court Judge, who determined, as an Appellate Judge from Berstein #1 that my actions were "**not** facts which reflect a great moral laps [sic] on the part of Attorney Klein."

Acting as Appellate Judge, United States District Court Judge Charles Brieant stated:

> "The appellant is an attorney who actively practices in this district and is well and favorably known to the Court. He is an attorney of diligence and good reputation and highly regarded.
>
> "The Court understands that sanctions occasionally are imposed as part of the efforts of courts to maintain the proper conduct of proceedings and I do not think that the facts set forth in this case reflect a great moral laps[e] on the part

of Attorney Klein."
see Appendix page 18

A complete copy of the transcript before the Judge Brieant is included in this appendix at page 14. A federal district court has further determined that the conduct complained of should not be the subject of discipline. See Appendix, page 13.

This is precisely why this Writ must be granted. A state court system, which has little knowledge or experience with bankruptcy court matters or Federal Civil Rights determined that I am to be suspended for five years based upon their misperception of bankruptcy law and the Federal Constitution. The Federal Courts, which do have extensive knowledge and experience have determined that I should not be suspended, at least in the New York Federal Courts, and that I can continue to practice law in those Federal Courts. See Appendix, page 13. The Federal Courts realized no attorney disciplinary charge can be based upon orders that violate due process, the First Amendment or Equal Protection.

Conspicuously absent from the opposition submitted by Respondent, is any case law argument regarding the violation of Equal Protection and First Amendment.

No agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or

denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." Ex parte Virginia, 100 U.S. 339, 346-47 (1880).

My suspension was also based upon an order which sanctioned me for insisting on my First Amendment Right to practice my religion by bringing a motion to arbitrate before a Rabbinical Court.[1] The Plaintiff in that case himself voluntarily dismissed the action, consistent with my motion, to his local Rabbinical Court of his choice.

Also, conspicuously absent from the Respondent's brief is any substantive opposition to the argument that the degree of the suspension was a violation of the Equal Protection Clause of the Constitution and requires this Courts review.

The suspension must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the suspension, so that all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

Bernstein #2 has slashed the sanction to 20% of the original sanction. This further demonstrates the state court disciplinary suspension was excessive and violative of due process and equal protection and it must be remanded to the New York State Courts for a

---

[1] Article 75, Civil Practice Laws and Rules of the State of New York

re-determination; something the New York Court of Appeals was unwilling to do, as the court of last resort in New York.

The genesis of the proceeding against me did not originate from any client or judge but from a litigation adversary. It does not involve any allegation that I in any way misappropriated or co-mingled any funds, neglected any case, was convicted of any crime or any of the multiple common reasons attorneys are disciplined. The disciplinary complaint was filed by a former employee. Thereafter, David Bushman, Esq., who, acted as that former employee's counsel and now offices with her, brought an action against me (which was dismissed) and filed a separate grievance (the "Bushman Grievance") against me on behalf of Eliezer Goldstock ("Goldstock").[2] Goldstock was then prosecuting a malpractice lawsuit against me.[3]

The suspension is the result of a vindictive adversary, and should not rise to a suspension for the conduct alleged. The suspension is excessive, especially when contrasted against other conduct by attorneys leading to censure or sanctions and not suspension.

---

2. The Bushman Grievance not only discussed the Goldstock litigation, but also the former employee litigation.

3. Upon the consent of Goldstock, the malpractice litigation was dismissed with prejudice in favor of arbitration through Goldstock's own rabbinical court. Goldstock has dropped the matter in all forums. Although the Respondent refers to him as "Dr. Goldstock" he is not a medical doctor, but instead has a mail-order "Doctoral" degree from a mail order study program.

All Procedural Remedies Were Exhausted

This petition originated from the highest court in New York, the New York Court of Appeals. The New York Court of Appeals denied my motion to reargue a motion to grant review of the suspension, after the United States Court of Appeals for the Second Circuit vacated Berstein #1 (a basis of the suspension). Respondent's suggestion that I exhaust my procedural remedies in a lower court defies logic.

This petition should be granted. The violation of due process, the violation of my right to practice my religion, the inconsistency of the penalty applied and finally my ability to support my family require this Petition be granted.

No suspension of the length imposed upon your petitioner can be found in any reporter for the conduct alleged. The arbitrary sentence has no fair of substantial relation to the object of discipline so that all persons are treated alike.

CONCLUSION

The Supreme Court is my last hope for upholding my Constitutional rights. I pray the Court will grant my Petition for Writ of Certiorari.

Dated: June 9, 1998
Spring Valley, NY

Respectfully,

Shmuel Klein, pro se
268 Route 59 West
Spring Valley, NY 10950
(914) 425-2682

CERTIFICATE OF SERVICE

STATE OF NEW YORK)
COUNTY OF ROCKLAND)

I, Asmaa Suqi, affirms under the penalties of perjury pursuant that I am not a party to this action and that I am over the age of 18 years old. I have an office at 268 Route 59, Spring Valley, New York 10977, and I served the within Petition for Writ of Certiorari and Appendix on June 10, 1998, by depositing a three copies thereof in a post-paid wrapper, placing it in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, overnight mail, addressed to:

Gloria A. Bunze
399 Knollwood Road, Suite 200
White Plains, NY 10603

Asmaa Suqi

Affirmed and subscribed to
before me June 10, 1998

Notary

ANDREA KLEIN
Notary Public, State of New York
No. 01KL5085025
Qualified in Rockland County
Commission Expires September 15, 1999

APPENDIX

NOTICE OF APPEAL OF BERNSTEIN DECISION
IN RE: MOSES STEIN

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

In Re: Case No. 94-20708(SMB)

MOSES STEIN

Debtor Chapter 13

----------X

NOTICE OF APPEAL

Shmuel Klein, Appellant pro se, appeals to the United States District Court for the Southern District of New York form an order of the United States Bankruptcy Court, Southern District entered in this case docketed May 11, 1998 and entered thereon.

The parties to the order appealed form and the names and addresses of their respective attorneys are as follows:

Ulster Savings Bank by
Law Office of Howard C. St. John
280 Wall PO Box 4380
Kingston, NY 12402

Shmuel Klein, pro se and Moses Stein
268 West Route 59
Spring Valley, NY 10977

Dated: May 15, 1998
Spring Valley, NY 10977

_____
Shmuel Klein
268 West Route 59
Spring Valley, NY 10977

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK:

----------x

IN RE:
MOSES STEIN Case No. 94 20708(SMB)
Debtor Chapter 13

----------x

APPELLANT'S DESIGNATION OF RECORD AND STATEMENT OF ISSUES PURSUANT TO BANKRUPTCY RULE 8006

Appellant having filed a notice of appeal on May 15, 1998 from an order of the bankruptcy court dated May 11, 1998, hereby designates the following for inclusion in the record on appeal and sets forth a statement of issues to be presented on appeal:

Designation of Contents of Record

1. Copy of Remand of the United States Court of Appeals filed October 20, 1997.

2. Copy of Remand of the United States District Court dated November 17, 1997.

3. Copy of Order of the United States Bankruptcy Court (Honorable Stuart M. Bernstein) entered on November 19, 1997.

4. Copy of File in the above captioned case dated after November 19, 1997

5. Copy of Memorandum Decision and Order Imposing Sanctions Against Shmuel Klein,

United States Bankruptcy Court (Honorable Stuart Bernstein, docketed May 11, 1998.

Issues Presented

1. Whether a remanded case should be heard by a Judge assigned to a division different from that required by the local rules of the Bankruptcy Court for the Southern District of New York?

2. Whether Judge Stuart Bernstein should recuse himself from hearing this case?

3. Whether the Judge Stuart Bernstein could be fair and impartial, having previously recused himself in other cases involving appellant?

4. Whether a sanction is error and or an abuse of discretion under the current circumstances?

5. How long may a Judge take in deciding an decision?

6. To what extent may a Judge defend himself in a decision?

Dated: May 15, 1998
Spring Valley, NY

Shmuel Klein
268 Route 59
Spring Valley, NY 10977
(914) 425-2510

FEDERAL COURT DECISION NO ACTION AT THIS TIME

UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NY 10007

CHAMBERS OF ROBERT P. PATTERSON, JR.
DISTRICT JUDGE

December 5, 1997

Shmuel Klein
268 Route 59 West
Spring Valley, NY 10977

RE: In the Matter of Shmuel Klein
M-2-238

Dear Mr. Klein:

After careful review of the papers you have submitted to the Court, the Grievance Committee for the Southern District of New York has determined to take no action at this time in the above referenced matter.

Sincerely,

Robert P. Patterson, Jr. U.S.D.C.J.
Chair, Grievance Committee

TRANSCRIPT OF HEARING BEFORE
JUDGE BRIEANT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

MOSES STEIN, SHMUEL KLEIN
Plaintiffs

-against- 96 CIV 06640 (CLB)

ULSTER SAVINGS BANK
Defendant

----------x

US Courthouse
White Plains, NY
October 25, 1996
12:30 p.m.

Before: Hon. Charles L. Brieant
U.S. District Judge

Appearances:

For the Plaintiffs: Shmuel Klein, Esq.

Sue Ghorayeb, R.P.R., C.S.R.
Court Reporter

THE CLERK: Moses Stein, Shmuel Klein versus Ulster Savings Bank.

THE COURT: Mr. Klein, I realize you have been waiting a long time. I regret that we have been running a little bit behind.

MR. KLEIN: Good morning, your Honor.

THE COURT: Would you take half of it and go home?

MR. KLEIN: Excuse me, your Honor. I am sorry. I didn't hear your Honor.

THE COURT: You have a motion here for refund of $2500.00?

MR. KLEIN: I actually compromised $3,500 by making a real good faith effort to settle everything. I mean this case is a done case. Stein has his house back, Ulster has their money, and the only issue is my good name, for which I won't say is worth much, but at least the sanction was wrong, Judge. I shouldn't have been sanctioned at all for this case. Judge Bernstein was a new judge. The Bankruptcy Court was in a real chaos.

THE COURT: I kind of asked you a question. You paid $2500 to the clerk?

MR. KLEIN: Yes, sir.

THE COURT: You want to get it back?

MR. KLEIN: Yes, sir. I think the sanction should be reversed.

THE COURT: Would you take $1,250 and run?

MR. KLEIN: If the sanction would be reversed, absolutely.

THE COURT: No, I can't reverse the sanction, but I may construe it to be an imposition of cost for unduly delaying and extending the litigation. I don't really feel that your good name is at stake.

MR. KLEIN: It is, Judge, because this thing has been turned over to the disciplinary committee and it's wrong.

THE COURT: What did the disciplinary committee do?

MR. KLEIN: They are still waiting for this appeal.

THE COURT: Because, you see, it's a somewhat convoluted set of facts here and --

MR. KLEIN: Because --

THE COURT: -- it really is so that you can't file a new petition under these circumstances.

What you had to do was to appeal the dismissal or move for re-argument on the dismissal, and the filing of the new petition is a violation, whether it's a good faith violation or not, or how serious a violation it is as things turned out I think is another question.

If you want to argue it and have me decide it, I am prepared to do that. I was thinking of yourself and I was thing of the fact that our resources are not infinite.

MR. KLEIN: Judge, I don't think it at all was a violation at all. I do a lot of bankruptcy, a lot of bankruptcy, and I will tell you that I have refiled within a 180 days after dismissal by trustee regularly.

THE COURT: But you did fail to disclose to the petitioner that there was a dismissal.

MR. KLEIN: That as I admitted in the record before Judge Bernstein was a clerical error, because we basically took the same petition and refiled it.

THE COURT: Well --

MR. KLEIN: And that I don't believe --

THE COURT: Whether it was a clerical error or whether it's sanctionable misconduct I think is certainly a close question, so you tell me what you want

to do. Do you want to have the Court simply decide on your papers or do you want to cut your losses and get out of here?

MR. KLEIN: I have got to reverse it, Judge, and I will take it up to the Supreme Court if I have to.

THE COURT: Very well, sir. Is there anything else you want to say? Because I have studied your papers. I am prepared to make my findings.

MR. KLEIN: Judge, I don't believe the conduct that I did rose to sanctionable conduct.

THE COURT: Well --

MR. KLEIN: The fact that the case was dismissed was severe enough; the fact that I paid even costs for Ulster Savings Bank was enough, but to say that I did something that was sanctionable, Judge Bernstein is wrong. He is wrong according to all the cases cited, even his own cases cited, which I can distinguish one after the other. Cappellardo, four filings, Judge, and no payments made. Stein, one was the second filing and he made his payments in the first petition and in the second petition.

THE COURT: All right. Why don't you be seated and I will decide your motion. I have studied it and considered it.

The Court makes the following decision in connection with this appeal:

This is an appeal by Attorney Shmuel Klein from an order of the United States Bankruptcy Court, Judge Stuart Bernstein, dated June 8th, 1994, and the appellant appeals from that portion of the Bankruptcy Court's order which imposed sanctions against him totaling the sum of $2,500. The sanctions have been paid. Certain other issues arising out of the case resulted in other costs and sanctions being imposed, and those have been resolved, so that they are no

longer before this Court for consideration. The appellant is an attorney who actively practices in this district and is well and favorably known to the Court. He is an attorney of diligence and good reputation and highly regarded.

The Court understands that sanctions occasionally are imposed as part of the efforts of courts to maintain the proper conduct of proceedings and I do not think that the fact set forth in this case reflect a great moral laps on the part of Attorney Klein. However, the Court will now set forth what it understands to the facts and will consider the conduct of Judge Bernstein as to whether it warrants reversal.

The appellant was an attorney representing a debtor by the name of Moses Stein. On November 15th, 1993, Mr. Stein filed a Chapter 13 petition. The incentive for doing so is because a foreclosure sale of his residence by Ulster Savings Bank (hereinafter referred to as the bank) was imminent, and that foreclosure was automatically stayed under Title 11 of the United States Code Section 362.

On March 10th, 1994, the bank moved to have the stay lifted on the grounds that Mr. Stein, the debtor, had not made any post-petition payments on his mortgage loan. On March 15th, 1994, Judge Berntein of the Bankruptcy Court lifted the stay, holding that the bank had demonstrated prima facie that payments pos-petition had not been made.

On March 17th, 1994, Mr. Stein and his attorney failed to appear at a Section 341 meeting with the Bankruptcy Trustee, Jeffrey Sapir, and United States Bankruptcy Judge Jeffrey Gallet.

I might note parenthetically that during a vacancy created by the untimely death of the Honorable Howard Schwartzberg of this court, various

Bankruptcy judges ordinarily stationed in Manhattan were taking turns covering the calendar here.

Because of the failure of the debtor to appear, the trustee, Mr. Sapir, moved to have the petition dismissed for failure to attend, failure to prosecute.

On March 31st, 1994, a motion to reargue the relief from the Bankruptcy stay was made before Judge Bernstein and reargument was granted, and the Bankruptcy Court, by Judge Berntein, heard reargument on April 6, 1994.

At the reargument, the debtor, Stein, produced copies of three checks, and the appellant contended on behalf of his client that these copies constituted proof that the post-petition mortgage payments had in fact been made. The bank conceded that it had been in possession of the checks, but contended that it was not aware of this fact when it made its original motion for a lift of the stay. The bank contended that it had not known that it had receive the checks on March 10th, 1994, because the checks were contained in a sealed self-addressed, stamped envelope, that was mixed among a pile of documents sent to Ulster Savings Bank apparently by the attorney's office or by the debtor.

The Bankruptcy Court through Judge Bernstein held that it would reimpose the stay if the debtor would pay Ulster in full within one week. The Bankruptcy Courts also concluded that the checks were originally misplaced in a sealed, self-addressed, stamped envelope as a result of malfeasance by Attorney Klein and imposed $500 on Attorney Klein as a sanction for that malfeasance. It turned out that at no time prior to, during, or after the reargument of Ulster's motion, did the attorney inform Judge Bernstein that a motion to dismiss the petition was pending before Judge Gallet.

On April 7th, 1996, unbeknownst to Judge Bernstein, apparently Judge Gallet granted the Bankruptcy Trustee's motion to dismiss Mr. Stein's petition on the grounds that he had failed to appear the Section 341 meeting.

On April 26, 1994, the debtor, acting through Attorney Klein, filed a second Chapter 13 Bankruptcy petition. The petition was affirmed and singed by the appellant, and that petition on its face violated Title 11 of the United States Code Section a 109 Subparagraph 9(g)(1), because it had been filed within 180 days of the dismissal of the prior petition and it did not say so. The petition, which was signed by the appellant, falsely represented that the debtor had not filed a previous Bankruptcy petition in any of the prior six years. The bank moved for relief from the stay imposed by the filing the second petition or alternatively for dismissal of the petition.

On June 8th, 1994, the Bankruptcy Court again acting through Judge Bernstein dismissed Stein's second petition. The Bankruptcy Court held that the second petition was filed to deliberately frustrate the rights of the bank and was indicative of a pattern of abuse of process by the debtor, in which the appellant had been a participant, and Judge Bernstein characterized the activity as something which "made a mockery of the prior proceedings and orders which this court has issued."

The Court then charged the attorney and the client with various malfeasance in connection with the proceedings concerning Mr. Stein, including the placing of the mortgage payment checks is a sealed, self-addressed envelope, and burying the envelope in a pile of papers; failure to appear at the Section 341 proceedings at the first petition; wasting the time and

judicial resources of the court by failing to inform Judge Bernstein, prior to the reargument of Ulster's motion for relief from stay, of the pending motion by the trustee to dismiss the first petition which was awaiting decision by Judge Gallet; failure of the attorney and client to appear in response to the trustee's motion to dismiss before Judge Gallet; the filing of a second petition in violation of Section 109 of Title 11, and the false representation in the second petition that debtor Stein had not filed for relief under the Bankruptcy Code in the previous six years.

Based on the totality of that conduct, Judge Bernstein imposed sanctions on the appellant, action pursuant to Rule 90111 of the Federal Rules of Bankruptcy Procedure. These sanctions include $2500 to be paid to the clerk for abuse of process, an extra cost imposed upon the court, and a thousand dollars to the bank to cover the cost of the bank's legal fees in answering the frivolous motions and improper second filing.

Subsequent to Judge Bernstein's decision to dismiss the petition and impose sanctions, the bank and the debtor reached a settlement which has been executed and performed. The appellant and the bank have entered into an agreement whereby the appellant has agreed not to seek recovery of the fines he was required to pay to the bank or sanctions. So it turns out now that the appellant is only seeking to recover $2500, which he was ordered to pay to the Clerk of the Court and which he has in effect paid, and consequently, the bank is not appearing in opposition to this appeal and there is nobody appearing here to protect the interests of the Clerk of the Court or the federal treasury.

The Court concludes that under Rule 9011 of the Federal Rules of Bankruptcy Procedure the activity would have constituted an abuse of the Bankruptcy process by parties and attorneys, within the meaning of the Mid-Tech Consulting case, cited through the Eighth Circuit.

And the Court finds that the second petition was an act -- the filing of which constituted a violation of Rule 9011. That rules addresses itself to two types of sanctionable conduct. First, whether the petition is frivolous or legally unreasonable or without factual foundation; and, second, where the pleading is filed for an improper purpose. Sanctions are said to be mandatory, although, nothing is ever mandatory for an Article 3 Judge.

Whether or not a violation has occurred is determined from the record within the court's discretion, and the standard to be applied is the objective reasonableness of the filing under all of the circumstances. Subjective good faith may be a factor which would enter into the amount of the sanction, but it cannot excuse conduct or activity which violates Rule 9011.

So the Court has to assess, first, whether the questions of fact regarding the prefiling inquiry and the factual basis of the filing have been attended to; and, second, whether the filing was warranted by existing law or by a good faith argument for changing the law, and then the Court has to fashion an appropriate sanction in compliance with the Cooter & Gell case of the Supreme Court.

Now, as I said, Rule 9011 closely tracks Rule 11 of the Federal Rules of Civil Procedure; however, Rule 11, as amended in 1993, requires the District Court to convene a hearing prior to imposing sanctions against a

party or an attorney. For that reasons, the appellant argues that Judge Bernstein erred in imposing sanctions against him without holding a hearing. However, this Court notes that while Congress amended Rule 11 in 1993, it did not amend Rule 9011, and under Rule 9011 of the Bankruptcy rules there is no requirement that a court hold a hearing before imposing Rule 9011 sanctions.

The record is clear that the appellant filed the second Bankruptcy petition with the knowledge that such a petition violated Title 11 Section 109(g)(1), and he endorsed the filing of the pleading in spite of the fact that the pleading falsely stated that he debtor Stein had not file da prior petition in the previous six years. So there is no rule of law which warrant the filing of a petition.

There is no good faith argument as to why the statute should be changed or why it should not apply to the debtor's second filing. The Court concludes that the proper procedure to have adopted would have been to move for reargument before Judge Gallet or to have taken an appeal from Judge Gallet's dismissal and sought a stay pending appeal from the District Court.

The Court does not believe that this violation by the attorney was something that obstructed the foundation of the Republic, but the Court does believe that there was no objective good faith basis for filing the second petition in the way that it was done and with the content that it contained, and the Court finds that the Bankruptcy Judge did not exceed his authority or abuse his discretion in imposing the sanction. And while the Court recognizes the persons might disagree and that the explanations offered at this point might have been accepted by the Bankruptcy Judge, perhaps the amount of the fine might have been less, but

essentially, on the totality of the record before me, I find no violation of due process and I find no abuse of discretion either in the imposition of the sanctions or in the amount of the sanctions which were imposed by Judge Berstein in this case.

The Court noted in the papers a suggestion that, ordinarily, recognizing difficulties in travel, attorney who like Mr. Klein come from across the river where there is very poor service on the bridge at the time the courts convene, and traffic is often delayed, and, ordinarily, wher Judge Schwartzberg ran the court he would have allowed for a second call or even heard people the next day when they failed to show up, but that's not binding on Judge Berstein and there is no showing that the debtor or the attorney actually was available for a second call before Judge Gallet.

So the foregoing constitutes my decision in connection with this appeal to the extend appealed from. The decision and order of the Bankruptcy Judge is affirmed. The Court understand Mr. Klein that you wish to have a full record here, and if there is some topic or issue which the Court has not dealt with adequately for your purposes, you can make a request on the record right now for me to amplify my holding, it that's what you wish.

MR. KLEIN: Thank you, your Honor.

I would request -- excuse me, your Honor -- that you reconsider the determination. In fact, at Judge Gallet's -- the day that Judge Gallet dismissed the case I did appear with the debtor and Ulster also appeared late. We all appeared late, we all looked at each other, and Judge Gallet had dismissed the case. We asked Judge Gallet, "Would you rehear it?" He said basically, "Refile." Because debtors do not have a lot of money to go through appeals, debtors don't have a lot of

money to go for motions to reargue, it's less expensive to pay another filing fee of $160, and I didn't charge him to refile the petition again.

THE COURT: What did Judge Gallet say to you?

MR. KLEIN: He basically said, "Go refile again if you need to."

THE COURT: Was that in the transcript?

MR. KLEIN: There was no transcript. This is off-the-record again. This is after the proceedings.

THE COURT: You see, I could -- accepting that as true, which I am prepared to do on your word alone, it seems to me that does not justify filing a petition which has a false allegation.

If the allegation in the petition had been that this was dismissed through inadvertence and we apply for reargument to the Bankruptcy Judge Gallet, he said, "Why don't you just refile," that would have been a different picture presented to Judge Bernstein. I think that while the record will indicate that the contention on your part, that does not alter the outcome.

MR. KLEIN: Judge Bernstein never heard that. The chaos in the Bankruptcy Court of having two judges hear one case and having two separate kinds of rules was terrible.

THE COURT: I appreciate the concern which you have.

MR. KLEIN: But --

THE COURT: You have received the outcome here. I do not believe it is appropriate for me to reverse the decision.

As I said earlier, while I think it's a sanctionable event, I don't think that the level of misconduct is quite so serious as you yourself seem to feel that it's being

perceived, and as far as I am concerned, you can take the transcript to the disciplinary authorities if you wish and you can present the entire matter there if you have to do so, by the Court is affirming the order appealed from.

Thank you sir.

MR. KLEIN: Thank you, your Honor.

THE COURT: Court will be in recess.

(Case concluded)